THE NISHGA TRIBAL COUNCIL
AND
TREE FARM LICENCE NO. 1

Public Report No. 4

June 1985

OMBUDSMAN OF BRITISH COLUMBIA

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I. INTRODUCTION

The vast majority of the forests in British Columbia are owned by the citizens of the Province. For decades, we have been heavily dependent upon our forest resources for our economic and social well-being. It provides thousands of jobs both in the forest industry itself and, indirectly, in many other sectors of our economy. Our future, in turn, depends in part upon the continued health of our forest resources.

The mandate of the Ministry of Forests is established by the Ministry of Forests Act and includes the following:

> to encourage maximum productivity of the forest and range resources in the Province; and,
>
> to manage, protect and conserve the forest and range resources of the Crown, having regard to the immediate and long term economic and social benefits they may confer on the Province.

In the latter part of January of 1985, representatives of the Nishga Tribal Council requested a meeting with me and at that time presented their complaint concerning the increasing depletion and degradation of the forest resources within Tree Farm Licence #1 (abbreviated in this report as TFL #1). The Nishga Tribal Council represents a number of Indian Bands whose homelands are north of Prince Rupert and include a large part of the land within TFL #1. The Nishga requested that I

investigate "forest management irregularities in the Nass River portion [the Nishga homelands] of TFL #1" and "the ongoing inattention to forest management responsibilities by the Provincial government and Westar Timber Ltd." This report describes my investigation, my conclusions and the recommendations I have made to the Ministry of Forests.

A Tree Farm Licence permits its holder an almost perpetual right to harvest timber from the licence area. In return, the Licensee is required to manage the forest resources, under the supervision of the Ministry of Forests, in such a manner as to ensure that the forest will continuously grow trees in order to provide a never-ending supply of timber products. The Ministry of Forests policy manual describes two main objectives:

> (a) rational, sustained-yield management of forest lands to produce the greatest possible return in wood, subject to environmental constraints;
>
> (b) stabilization and perpetuation of industry and communities.

Tree Farm Licence #1 is held by a company now called Westar Timber Ltd. My investigation did not review Westar's role in this complaint, but rather focussed on the actions and decisions of the Ministry of Forests which is required to constantly monitor and supervise the management of the forests within TFL #1. However, because it is directly affected by my findings and recommendations, I provided Westar with a copy of my preliminary report to the Ministry of Forests and extended to it an opportunity to comment upon my findings. (I should note here that my correspondence with both the Deputy Minister of Forests and the President

of Westar Timber is attached as the appendices to this report.)

The purpose of providing both the Ministry of Forests and Westar with a copy of my preliminary report on this investigation was, of course, to ensure that both parties had an opportunity to identify possible errors in my investigation and in my preliminary findings. In this case, neither the Ministry nor Westar argued that my findings on specific issues were in error. Instead, I was presented with what is essentially and economic and political argument.

The Deputy Minister of Forests summarized the position of his Ministry as follows:

> "I would like to assure you that we have given serious consideration to the amendments and adjustments to the Ministry standards before we approved them, and that our decisions were based on our view that they were necessary for the continued operation of the company. It has also been our view that keeping the company operational is our best assurance not only to maintain community stability in the area, but also to achieve reasonable forest management in the long run."

It appears to me that the Ministry is willing to allow poor forest management practices to continue in order to ensure that Westar continues to operate in the short term, and to accept the consequent risk that the forests within TFL #1 will be depleted and worthless in the long term.

My role as Ombudsman is to investigate the actions and decisions of government agencies with a view to ensuring that the law is properly and

fairly administered. In this case, I have concluded that the Ministry of Forests has failed in its mandate to "encourage the maximum productivity of the forest and range resources in the Province" and to "manage, protect and conserve the forest and range resources of the Crown . . ." The Ministry's position that it must ensure that Westar remains in business and thus protect the jobs which it provides in local communities is a matter of political priorities and not one upon which I can or should comment.

I am making this report public at this time for two reasons. First, two weeks ago a Member of the Legislative Assembly released to the media a copy of Westar's letter to me in response to my preliminary findings. That letter, of course, presented Westar's position only; I think it important that the public also be informed of the other side of the story. Second, the issues raised in this complaint are of enormous importance to the future economic and social well-being of the citizens of British Columbia. If we do not manage, protect and conserve our forests in a way that ensures their long-term health, we will not have the constant supply of timber upon which we have depended for so many years. For these reasons, I feel it would be irresponsible of me, as Ombudsman, not to disclose these findings to the public.

II. THE COMPLAINT

In 1970, Tree Farm Licence #1 and TFL #40 were amalgamated into TFL #1, which was then held by Canadian Cellulose Ltd.

In 1979, when the Provincial Government formed the B.C. Resources Investment Corporation (BCRIC), the assets which were held by the Crown in Canadian Cellulose were assigned to this new public company. During 1980, BCRIC acquired all of the remaining outstanding public shares in Canadian Cellulose and by the end of that year formed B.C. Timber Ltd. In April 1984, B.C. Timber changed its name to Westar Timber Ltd.

The Nishga Tribal Council is comprised of a number of Indian Bands which are native to a large area of British Columbia north of Prince Rupert. This area has been included in Tree Farm Licence #1 (TFL #1) for more than thirty years.

The Nishga Tribal Council had long been concerned about the forest resources of the Nass Valley since it is the homeland of the Native bands which constitute the Council. In 1983, because of their concern that the forest resources in the area <u>were not</u> being managed properly, the Nishga had retained the services of Silva Ecosystems Ltd., which is operated by Mr. Herb Hammond, a Registered Professional Forester. Silva's report

indicated that there had been serious mismanagement of much of the forest resources within TFL #1. It concluded (1) that there had been a "highgrading" pattern of development: Westar had harvested primarily the most accessible, good quality timber and left the poorer quality timber behind; (2) substantial amounts of merchantable timber had been left to deteriorate on the ground; (3) the allowable annual cut permitted by the Ministry of Forests had been manipulated to permit Westar to accelerate its harvesting of the good quality timber while at the same time ignoring the poorer quality and more difficult to access stands; and, (4) reforestation obligations had not been fulfilled to the extent that the process of regenerating much of the area which had been denuded was eight years behind schedule.

The concern of the Nishga was shared by others in the area. On May 25, 1984, the Mayor of Terrace wrote to the Honourable T. Waterland, Minister of Forests, and informed him that the Municipal Council was concerned with the operations of Westar. He requested that the Ministry undertake an investigation of the operations of Westar "to determine if the terms and conditions of Tree Farm Licence No. 1 are being met and what verbal or written concessions were being given concerning operations in TFL No.1."

On June 8, 1984, the Member of the Legislative Assembly for Skeena, Mr. Frank Howard, wrote to the Minister of Forests expressing his concerns over Westar's operations which had left "a great deal of dissatisfaction

in the minds of the general public and, in particular, its employees in both the logging and sawmilling side of its activities." Mr. Howard suggested that a public inquiry under the Inquiries Act be held to investigate the manner in which Westar was dealing with the publicly owned forest resources within TFL #1.

In January of 1985, the Nishga Tribal Council complained to my office about the Ministry of Forests' mismanagement of TFL #1. The Nishga asserted that the Ministry had allowed Westar to employ a highgrading pattern of development (i.e. allowing Westar to harvest the highest quality and most easily accessed timber while leaving the difficult-to-access and poor stands) and that the Ministry had not ensured that Westar fulfilled its reforestation responsibilities. The Nishga requested that I investigate "forest management irregularities in the Nass River Portion [the Nishga homelands) of TFL #1" and "the ongoing inattention to forest management responsibilities by the Provincial Government and Westar Timber Ltd."

In response to the Nishga's complaint, my staff reviewed Ministry files to examine the Ministry of Forests' enforcement of Westar's obligations. My staff and I discovered that the information we found on Ministry files largely supported the conclusions reached by Silva. Furthermore, this review brought to my attention the fact that significant changes regarding the allowable annual cut and the utilization standards had recently been proposed by Westar. My investigation expanded to encompass this subject as well.

III. THE LAW AND MINISTRY POLICY RESPECTING TREE FARM LICENCES

The forests of the Province of British Columbia are a Crown resource. They are administered by the Ministry of Forests. The Ministry of Forests Act outlines the responsibilities of the Minister of Forests. He is required to encourage the maximum productivity of the forests and to manage the forest resources to achieve both immediate and long-term economic and social benefits for the Province.

The Forest Act describes different types of tenure which a licensee may hold. The most secure type of tenure is called a Tree Farm Licence. Such a licence is for a term of 25 years. Just before the expiry of 10 years, the licence holder can request a replacement of the tree farm licence and the Forest Act states that the Minister shall give him a new licence.

The tree farm licence also imposes certain obligations on the licensee. The licence holder may only harvest a certain amount of timber every year and he must undertake reforestation treatments on the land after harvesting. The licensee must also pay stumpage to the Crown for the timber it harvests. However, section 88 of the Forest Act permits the licence holder to set off its costs of constructing logging roads (in order to get to the timber it wishes to harvest) and its reforestation

costs against the stumpage which it owes the Crown. Hence it is possible to have a situation in which the licensee's road construction and reforestation costs exceed the amount payable for stumpage. The result of such a situation is that the licence holder would have a credit with the Crown and so would not pay anything for the timber harvested.

Every five years, the tree farm licensee must submit a Management and Working Plan to the Chief Forester for his approval. This Plan outlines some of the specific obligations of the licence holder with regard to protecting the tree farm licence area from damage by fire, insects, disease; plans for reforesting the area; the amount of timber which is to be harvested. The term which refers to the amount of timber which is to be harvested every year is the "allowable annual cut." The Management and Working Plan is legally considered to be a part of the Tree Farm Licence.

IV. THE ISSUES

1. Reforestation

Management and Working Plan #6 for Tree Farm Licence #1 was approved by the Chief Forester for the period 1979-1983. In this Plan, Westar committed itself to regenerate the logged areas within a five-year period from the date of harvesting. Areas which were expected to regenerate naturally were to be examined three years after logging and areas where restocking problems were anticipated were to be inspected within a year after logging. Westar was also to develop a Stand Improvement Program which was to be submitted to the Chief Forester by March 1, 1980.

My staff made inquiries about the reforestation schedule and Stand Improvement Program, and were told these were never developed by Westar. Plans to catch up on reforestation which had not been done in previous years and a juvenile tree spacing program were cancelled in 1981. The reasons given by the Regional Staff Manager of the Ministry in Smithers were that Westar had a build-up of section 88 credits, there had been strikes and work stoppages in the industry, a turndown in the economy, a lack of corporate level support to fund these programs in poor market conditions, and the fact that the quality of timber on TFL #1 did not generate enough stumpage to pay for all the work required to meet the

conditions of the TFL agreement.

My staff examined the Ministry of Forests administration file on TFL #1. The following information was all derived from that file.

Between 1979 and 1983, 13,713 ha. had been surveyed to determine the rate of regeneration. Only 7,052 ha. (51.42%) were found to be satisfactorily restocked.

The Strain-Davies Report was a confidential joint B.C. Timber/Ministry of Forests Review of B.C. Timber's Northern Operations. The first part was submitted to the Ministry of Forests in May, 1983. In December, 1983, Supplement III was submitted. Page 18 of this Supplement states that a major silviculture backlog existed on TFL #1. It was estimated that it would cost $12 million to reforest this backlog to the "free to grow state."

When Westar submitted its first draft of Management and Working Plan #7 (which was initially intended to be effective as of January 1, 1984, and had not yet been approved at the time of my Preliminary Report), it argued that it did not have enough section 88 credits in order to commit itself to an adequate reforestation program. The Chief Forester, after discussions with Westar officials, wrote on October 19, 1982, to the Regional Manager of the Ministry at Smithers and pointed out that basic silviculture "is mandatory under the tenure." In other words, basic

silviculture must be performed whether or not the licensee has section 88 credits to cover the costs involved.

On November 16, 1984, a Silviculture Officer at Smithers sent a memo to the Regional Manager outlining the silviculture status on the "Northern Portion" of TFL #1, as follows:

"Harvested, 1970 - 1983	4,100 ha.
Total planted	1,100 ha.
Total natural regeneration	500 ha.
Total indicated NSR [Not Satisfactorily Restocked]	2,500 ha."

In other words, 60% of this logged area had not been properly reforested.

Negotiations between Westar and the Ministry of Forests were going on at this time with regard to this Northern portion of TFL #1. Westar wanted this area deleted from TFL #1 (it subsequently was deleted by Instrument 90 on February 12, 1985); it contains primarily poor quality timber. On December 12, 1984, the Silviculture Manager of the Siviculture Branch sent a memo to the Director of the Timber Management Branch recommending that Westar's silvicultural obligations on the Northern Portion be embodied in the instrument drawn up to amend TFL #1. Instrument 90, which effected the deletion of the Northern Portion did not contain any reference to Westar's obligation to fulfill its reforestation responsibilities.

On February 12, 1985, a Forester in the Resources Planning Section of the Planning and Inventory Branch commented on Westar's draft of Management

and Working Plan #7 as follows:

> "Management Goal No. 2 states that the licensee will only commit himself to basic forestry to the extent funding is available. As far as we are aware basic silviculture must be accomplished on the Tree Farm Licences regardless of the availability of funding under section 84 or 88 of the Forest Act."

Preliminary Findings

After reviewing the Ministry's files, I submitted my Preliminary Report to the Ministry of Forests on May 17, 1985. Based on the information I had found, it appeared to me that the Ministry may not have fulfilled its legislative responsibilities of ensuring that effective and adequate reforestation practices were taking place on TFL #1 since 1979.

I asked the Ministry whether it had taken any action to perform Westar's silvicultural responsibilities on its behalf and to bill Westar the "reasonable costs incurred", as it is empowered to do under paragraph 12.03 of the Tree Farm Licence.

I also stated that it seemed to me (as various Ministry employees had asserted) that basic silviculture is mandatory under the Forest Act and must be carried out regardless of stumpage credits available under section 88. I did not think that Westar could decline to carry out its reforestation responsibilities for the reason that it did not have any stumpage charges to set off. Otherwise, reforestation responsibilities may never be carried out and Tree Farm licensees would never have to pay

stumpage to the Crown. Yet the lack of section 88 credits and Westar's current economic difficulties were being cited as reasons for the cancellation of Westar's juvenile spacing and backlog reforestation programs.

I asked the Ministry of Forests how much stumpage, after set-off for section 88 credits, Westar had actually paid to the Crown for timber harvested from Tree Farm Licence #1 since Management and Working Plan #6 had come into effect in 1979.

It appeared to me that the Ministry may have acted improperly in not enforcing Westar's reforestation obligations under section 145 of the Forest Act and as enumerated in Management and Working Plan #6. This Plan is considered to be part of the Tree Farm Licence itself. A tree farm licence grants to its holder extensive timber harvesting rights of a public resource. The Licence and the Management and Working Plan outline the licensee's obligations and responsibilities. It is the Ministry's responsibility to ensure that the licensee lives up to his obligations.

I concluded that the Ministry of Forests may have acted contrary to law in not fulfilling its statutory responsibilities under section 4 of the Ministry of Forests Act to encourage maximum productivity of the forest resources and to manage and conserve the forest resources having regard to the immediate and long-term economic and social benefits which they may confer.

Ministry Response

On June 13, 1985, the Deputy Minister of Forests responded to my preliminary findings. He commented first on the broad nature of the problems faced by Westar, which had lost an average of $16.9 million (pre-tax) per year for the last six years (1979-84). He stated that Westar's problems were directly related to the decadent nature of the timber in TFL #1 and to the high cost of supplying raw material to its Watson Island pulp mills. The Deputy Minister stated that if strict enforcement of all the provisions in the TFL should force Westar to close its mills, that it was unlikely that any other company would be willing to take the financial risk of either buying out Westar or building a new mill in the area. In addition, the closure of the company's mills would result in the substantial loss of the communities' main employment base.

With regard to Westar's silvicultural responsibilities on the deleted Northern Portion, the Deputy Minister answered that Westar was currently planting one million seedlings in the Kinskuch area which was deleted from TFL #1.

In response to my question as to whether the Ministry had taken any action under paragraph 12.03 of the Licence to perform Westar's silvicultural responsibilities, the Deputy Minister responded in the negative. He stated that "we will do our reasoned best to ensure that the company will also undertake their basic forestry requirements within the TFL."

In response to my question as to how much stumpage, after set-off for section 88 credits, Westar had actually paid to the Crown, the Deputy Minister provided the following information:

Year	Stumpage Billed $	Cash Payment $	Section 88 Credits $	Accounts Receivable $
1980	1,719,850	102,230	1,617,620	-
1981	783,555	4,650	778,905	-
1982	247,549	1,321	246,228	-
1983	385,669	-	385,669	-
1984	802,011	7,751	794,260	-
1985*	269,032	2,013	241,134	25,885
Total	4,207,666	117,965	4,063,816	25,885

*As of May 28, 1985

2. Utilization

"Allowable annual cut" is defined in section 1 of the Forest Act as "a rate of timber harvesting specified for an area of land." Before this figure of harvesting can be determined, other calculations must be made. The underlying concept of a Tree Farm Licence is management of a renewable natural resource on a sustained or perpetual yield basis. Stated simply, assuming a 70-year growth period for timber to reach maturity, the licensee divides the area within the TFL into 70 parts. Each year one part is logged (1/70th of total timber in the TFL) and the growth of new trees on the part logged the previous year commences. In the 71st year of operation the cycle will be complete and the licensee

will start logging the first part for a second time. I selected a 70-year growth period merely as an example: the calculation of the rotation period must take into account many factors such as species of tree, geographical conditions, pests, disease. fire, etc. After the rotation period has been determined, it is possible to estimate the Long Run Sustained Yield, or the rate of harvesting which is sustainable in the long term. The allowable annual cut, then, should be a level of harvest which can be sustained over the long term.

Utilization standards are set by Ministry policy and are included in the Tree Farm Licence and the Management and Working Plan. These standards set the obligatory diameters by species which must be harvested. For example:

> All living and dead trees 20 centimetres in diameter or larger, measured outside bark at a point 30 centimetres from the ground, must be cut.

There is another aspect to utilization standards. The Ministry's general policy is to hold licensees to a Close Utilization Standard of 50%. A tree of the required diameter is felled and then cut into log lengths. If a log length is not 50% sound (i.e. if there is more than 50% rot) then the log need not be removed by the licensee. The Ministry also has a Relaxed Utilization Standard of 65%. In other words, if the log is not at least 65% sound, it need not be utilized.

Past Utilization Issues

The allowable annual cut approved by the Chief Forester for TFL #1 grew from 347,000 m^3 in 1952 to a high of 2,038,820 m^3 in 1970. In 1979, it was reduced to 1,291,560 m^3. The large increase from 1970-78 occurred when former TFL #40 was amalgamated with TFL #1 and the allowable annual cuts were combined. However, even after the amalgamation, logging in the areas previously contained in the former TFL #40 area was described by the Deputy Minister of Forests as "minimal". Hence it appeared to me that the substantial increase in the allowable annual cut from 1970-78 achieved little other than to permit Westar to increase its annual harvest of the easily accessed, high quality stands of timber in the Nass River bottomlands of TFL #1.

Professional foresters have advised me that a long-term forest management plan should balance logging operations over the different forest sites within the licence area. In other words, timber should be harvested from difficult to access sites with lower quality timber as well as from easily accessed sites with high quality timber. Such an approach ensures both that timber harvesting over the long term remains economic and that both high and low quality stands of timber are rehabilitated.

The Ministry's granting of cutting permits between 1970-78 appeared to authorize a "highgrading" pattern of development, i.e. Westar was permitted to log the high quality, easily accessed stands of timber.

This may be a general trend in the area since Page I-10 of the Ministry's "Forest and Range Resource Analysis, 1984" states that as "logging operations are largely confined to timber with the highest net value, . . . the high value end of the supply is being depleted."

Future Utilization Issues

My staff's review of Ministry files in response to the complaints of the Nishga Tribal Council brought to my attention the fact that significant changes regarding the allowable annual cut and utilization standards had recently been proposed by Westar.

The April 29, 1985 draft of Management and Working Plan #7 submitted to the Ministry by Westar provides that:

> "The annual rate of harvest has been set at 360,000 m^3 based on 85% firmwood sawlog quality. In addition, the Licensee intends to harvest a minimum 150,000 m^3 below 85% firmwood sawlog quality annually during the term of MWP 7. This additional volume is subject to market demand."

In other words, Westar would be obligated to harvest 360,000 m^3 of timber that is 85% sound: if a log length has more than 15% rot, it need not be utilized. Westar also states that it intends to harvest a minimum of 150,000 m^3 of pulpwood if there is a market demand for pulp.

Information Obtained from Ministry Sources

Following are some extracts from the "Davies-Strain Report" which was submitted to the Deputy Minister of Forests on May 19, 1983.

> "-BCT [Westar] Mills are not capable of processing the forest profile (i.e. saw-timber and pulplogs) in the most efficient manner.
>
> -The viability of BCT's northern operations is tied directly to the success or failure of the Watson Island pulpmill. The Watson Island mill receives a higher percentage of its furnish in the form of roundwood pulp than other mills in B.C. A significant cost disadvantage is associated with the use of roundwood pulp vis-a-vis by-product chips. The cost of this furnish must be reduced if the Company is to be more viable than at present."

After reviewing this Report, the Director of Timber Management wrote to the Assistant Deputy Minister on May 26, 1983. According to the Director, Westar had invested $130 million in the Watson Island pulp mill in 1977-79 but had had serious difficulties in operating the mill profitably. He stated that if Westar could not operate the pulp mill at Watson Island at existing levels, they should operate it at a lower level and "write off as a loss what appears to have been a poor investment. The public should not consider turning that investment into a profitable one by subsidizing the company."

The Director also reviewed some recent purchases by Westar. In 1980, Westar had purchased two other companies in the area: Skeena for $15.5 million and Rim for $15.7 million. Westar then sold the Skeena mill for about $2 million. Assuming a value of $1 million for logging equipment,

the Director estimated that Westar had paid $12.5 million for the harvesting rights of Skeena and a similar amount to Rim. He went on to state that:

> "It is bordering on the unbelievable that the company that has put such high value on the timber a mere 2-3 years ago now argues that it has negative values and that the harvesting of it should be subsidized by the taxpayers."

The Director also noted that the timber quality on TFL #41 was not any better than that on TFL #1 and that the holder of TFL #41 had never requested a subsidy. Nor had the other licensees in that Timber Supply Area (Kispiox). The Director went on to say that:

> "I am convinced that our province cannot afford subsidizing the forest industry. I am convinced that it is much easier not to start it than to limit it, for there are so-called negative value stands in many parts of our province.
>
> The province, has for 100 years, sold timber harvesting rights. Let us not change from that very basic premise to subsidized timber harvest, for we would need a bottomless pit of money for such undertakings."

In a letter dated February 10, 1984, Westar submitted several proposals for Management and Working Plan #7 to the Assistant Deputy Minister. One of these proposals was to implement an 85% sawlog standard for its allowable annual cut.

The then Deputy Minister of Forests responded critically to these proposals. In a memorandum to the Minister of Forests, he stated that

the result of Westar's proposals would be that Westar would have:

> "an area-based tenure with us paying the bills. B.C. Timber [Westar] appears to want to have their cake (area-based tenure) and to eat it too (no responsibilities of a TFL)."

Nevertheless, on July 25, 1984, the Honourable T. Waterland, Minister of Forests, wrote to Westar and advised that the 85% sawlog utilization standard was acceptable provided that the allowable annual cut of the TFL area was calculated on that standard; that Westar was prepared to remove at least 150,000 m^3 of wood below that standard each year; and, that the Minister would reserve the right to enter into timber sale agreements within the licence area with anyone who wished to remove pulpwood (i.e. wood below the 85% sawlog standard). In this letter, the Minister also stated that he was prepared to present Cabinet with Orders in Council to establish stumpage at the minimum rate permitted by statute for sawlogs, and at 10¢ per m^3 for pulpwood. He added that he was also prepared to forego stumpage appraisals except for the few test or check appraisals that may be required from time to time.

Following receipt of the Minister's letter, Westar submitted a proposed agreement to incorporate these changes into the TFL. The agreement provides for an annual allowable cut of 360,000 m^3 of wood at the 85% sawlog quality standard. However, it also provides for an "optional volume" of <u>pulpwood</u> that <u>may</u> also be harvested, bringing the total harvest to 765,000 m^3. The annual rent which Westar pays to the Crown would be based on the lesser figure of 360 000 m^3. The proposed

agreement would also authorize the Minister to grant Timber Sale Licences to other parties subject to certain limitations and constraints.

In a December 18, 1984, confidential memo to the Deputy Minister, the Executive Director, Legislation and Policy, wrote as follows:

> "The company proposal gives rise to some potential conflicts with the Forest Act:
>
> 1) it would fetter the Chief Forester's determination of an AAC as required under section 28(g)(i)(D) of the Act;
>
> 2) it provides either for two AAC's for the TFL or for a division of the AAC for rental and cut control purposes (the Act provides for only one AAC which must be used for the rent calculation);
>
> 3) it would fetter the Minister's discretionary powers to sell timber to others under the Act.

The Executive Director, Legislation and Policy, went on to say that the Minister may have agreed to the 85% firmwood standard in the belief that the current relaxed standard was nearly equivalent to 85%. According to a Ministry employee, this was a misconception as the existing relaxed standards were actually closer to 65%.

On January 31, 1985, the Manager of the Resource Planning Section of the Ministry sent a memo to the Director of the Timber Management Branch. The memo expressed the concerns of the Manager and his staff. He wrote that the single option which was being examined (the 85% sawlog standard) did not represent a sufficient range of options to provide the Chief Forester with an adequate basis for setting the allowable annual cut. He was concerned that the 360,000 m^3 which the licensee would be obligated

to cut plus the minimum 150,000 m^3 pulpwood harvest would result in a rate of harvest below the Long Run Sustained Yield.

The Manager reiterated the position of the Forest Service which was that in areas which contain a large amount of old growth timber, a rate of harvest should be set which would accelerate the removal of the old growth. This position was intended to facilitate the establishment of thrifty second growth timber and lead to a more balanced age class structure in the future (currently the majority of the forest within TFL #1 is overmature and poor quality). He went on to say that from a forest management point of view, setting a rate of harvest on the basis of Westar's proposed 85% sawlog quality standard would both intensify short-term reforestation problems (because either reforestation costs or regeneration delays would increase) and accentuate the present decadence in the overmature forests (because continued harvesting below the Long Run Sustained Yield would lead to even greater utilization problems in the future).

On February 13, 1985, the Manager of the Resource Planning Section wrote to the Chief Forester in a memo, as follows:

> "It is the Chief Forester's responsibility to approve a utilization standard as part of the MWP, in accordance with Section 28(g)(i)(D) of the Forest Act. Before our Feb. 22/85 meeting with Westar to discuss their MWP, we require your direction with respect to the following items:
>
> 1. Will you approve an MWP that proposes an AAC on the basis of an 85% sawlog utilization standard? This sawlog

utilization standard, as proposed, is expected to reduce the AAC to 360,000 m^3, thereby reducing the annual rent payable to the Crown.

2. Will you approve an MWP that proposes a "total sustained yield capacity" as the rate of harvest? This term, as specified on the attached agreement, is based on a 50% firmwood utilization standard and is estimated to be 765,000 m^3 by the licensee."

In a handwritten note at the bottom of the memo, the Chief Forester replied "Yes, I will approve because I have no option. Please proceed."

Preliminary Findings

a) 85% firmwood sawlog standard

It appeared to me that the Ministry had approved the 85% sawlog utilization standard in the mistaken belief that the figure represented the then current relaxed utilization standards. Information from the Ministry files indicated that the existing relaxed standards were actually closer to 65% firmwood. Hence I made a preliminary finding that the 85% standard may have been approved by the Ministry based in whole or in part on a mistake of fact.

b) Utilization

The Long Run Sustained Yield is a rate of harvest which can be sustained for the long term. Harvesting much less or much more will defeat the objective of developing a continual supply of merchantable timber.

Appendix V-14 of Westar's April 29, 1985 draft of Management and Working Plan #7 quite properly states that the level of harvest chosen is the key to the whole analysis involved in determining the Long Run Sustained Yield.

Appendix V-25 of the draft Plan #7 states that the level of harvest for the next 50 years will be 765,000 m^3. However, in the same draft Plan Westar is only obligated to harvest 360,000 m^3 of 85% firmwood sawlog standard. It did not appear to me that there was any obligation on Westar to harvest pulpwood. (The Plan states that "The Licensee intends to harvest a minimum 150,000 m^3 below 85% firmwood sawlog quality annually . . . subject to market demand." To me, a statement that the Licensee "intends" is not the same as saying that the Licensee "shall" or the Licensee "must".)

Moreover, the rate of harvest for the next 50 years was estimated at 765,000 m^3. Even if Westar harvested the 150,000 m^3 of pulpwood as suggested in the Minister's letter of July 25, 1984, this amount, when added to the 360,000 m^3 of sawlog quality timber (150,000 m^3 + 360,000 m^3 = 510,000 m^3), would still result in a harvest 255,000 m^3 short the Long Run Sustained Yield figure of 765,000 m^3. Hence it seemed to me that a sustained yield could not be achieved since there was no requirement that the necessary rate of harvest would be maintained.

As noted, much of the forest resources of TFL #1 are overmature and

decadent. Good forest management would accelerate the harvesting of this old growth so that a more valuable second growth could be established in its place. Yet Management and Working Plan #7, now in its third draft, would commit Westar to harvest only 360,000 m^3 of 85% sawlog quality timber. Given its statutory responsibilities under the Ministry of Forests Act to manage and conserve the forest resources of the Crown, having regard to the immediate and long term economic and social benefits they might confer on the Province, my preliminary finding was that the Ministry of Forests may be acting improperly if it were to approve the utilization standards set out by Westar in its latest version of Management and Working Plan #7.

c) Allowable Annual Cut

Section 1 of the Forest Act defines "allowable annual cut" as a rate of harvest specified for an area of land. Section 29(g) of the Forest Act requires the Chief Forester to approve an allowable annual cut after considering certain specified criteria, one of which is the standard of timber utilization. The latest draft of Plan #7 states that the allowable annual cut is 360,000 m^3 of 85% sawlog quality. As proposed, the Plan also allows Westar the option of harvesting an additional 405,000 m^3 of pulpwood.

Under a tree farm licence, the licensee must harvest between 50% and 150% of his allowable annual cut every year, and between 90% and 110% of his

allowable annual cut over a 5 year cut control period. Plan #7 makes reference to the 360,000 m^3 figure for minimum cut control purposes but for overcut situations (in which damages are assessed against the licensee) the operative figure would be 765,000 m^3.

Many different sections of the Forest Act and of the Tree Farm Licence #1 refer to the "allowable annual cut". For example:

(A) Paragraph 4.03 of the Licence addresses the situation in which the licensee cuts more than 150% of his "allowable annual cut" during a calendar year, and the amount of liquidated damges which he must then pay the Crown;

(B) Paragraph 4.04 of the Licence addresses the situation in which the licensee cuts more than 110% of his "allowable annual cut" during a five-year cut control period, and the amount of liquidated damages he must then pay the Crown;

(C) Paragraph 4.02 of the Licence refers to the permissible range of harvest in relation to the specified "allowable annual cut", both for a calendar year and for a five-year cut control period; and

(D) Section 90 of the Forest Act sets out the method for calculating a licensee's rent based on his "allowable annual cut."

All of the above provisions refer to a single "allowable annual cut" yet if Plan #7 is approved, as a result of Instrument 90 the relevant figure in situations A and B would be 765,000 m^3, while in situations C and D the relevant figure would be 360,000 m^3. Moreover, the figure which produces the most beneficial result to the licensee is the figure used. It appeared to me, then, that there are in fact two allowable annual cuts

and therefore that approval of Plan #7 would be contrary to law.

The memo (which I quoted above) from the Manager of the Resource Planning Section asked the Chief Forester whether he would approve a Management and Working Plan which proposed, on the one hand, an allowable annual cut based on 85% sawlog utilization standard, and, on the other, a "total sustained yield capacity" as the actual rate of harvest. My review of the Ministry's correspondence with Westar indicated that the Ministry of Forests had, in fact, already agreed that the allowable annual cut could be based on the 85% standard and that the company could harvest additional pulpwood. The Chief Forester's handwritten response illustrated that he had no choice but to approve these proposals. For this reason, I made a preliminary finding that the Ministry of Forests had fettered the Chief Forester's statutory authority to establish the allowable annual cut for the Licence area and in doing so acted contrary to law.

The Ministry's Response

On June 13, 1985, I received an answer from the Deputy Minister of Forests. He stated that his Ministry's negotiations with Westar were in the spirit of the Ministry's mandate as set out in section 4(a) of the Ministry of Forests Act. He went on to say that by requiring the licensee to harvest at least 150,000 m^3 of pulp logs per year (although, as noted, this requirement has not to my knowledge to

introduced into Management and Working Plan #7), and by providing an opportunity for the Ministry to offer Timber Sale Licences to third parties to harvest pulp logs, the Ministry had struck a reasonable balance between the Ministry's desire to utilize as much of the harvested timber as possible and the economic realities of utilizing low quality timber.

The Deputy Ministry also stated that Plan #7 was incorrect when it referred to two allowable annual cuts. Rather, he stated that there was an allowable annual cut (360,000 m^3 of sawlog quality) and a "specified volume" (405,000 m^3 of pulp logs). I remain at a loss to understand the distinction.

3. Rent for 1985

Section 90 of the Forest Act provides that the rent to be paid by a tree farm licensee for its consumption of publicly owned timber is based on the allowable annual cut.

On December 31, 1984, the Minister of Forests wrote to Westar that the term of Management and Working Plan #6 would be extended until December 31, 1985. On January 14, 1985, Westar wrote to the Minister to confirm that certain operating guidelines would remain in effect until Plan #7 was approved. One of these guidelines was that "1985 rent will

be calculated based on AAC [allowable annual cut] as determined in MWP No. 7 which will reflect the revised utilization standards."

On December 6, 1984, the Tree Farm Licence Officer wrote to the Director of the Timber Management Branch to advise that the Ministry's legal counsel had telephoned and that he was "principally concerned over the prospects of basing an annual rent solely on the sawlog AAC of an area. Section 90 requires that an annual rent be paid on the productive capacity of the land."

In my review of the Ministry's files, I did not find any response to Westar's request that its 1985 rent be based on the sawlog component of the allowable annual cut as proposed in Plan #7. Hence I made the assumption that this proposal was acceptable to the Minister of Forests. I made the preliminary finding that if the Ministry were to base Westar's 1985 annual rent on the sawlog component as requested by Westar, such an agreement would be contrary to law.

Ministry's Response

The Ministry responded on June 13, 1985 to my preliminary findings. There was no reference at all to my comments on the rent due for 1985. While the Ministry did answer my specific questions, they did not respond, even indirectly to a large part of my preliminary report. On

June 17, 1985, I again wrote to the Deputy Minister asking him to provide me with any information which he would like me to consider before I made my final report.

On June 20, 1985, the Deputy Minister answered that his letter of June 13, 1985, had addressed my findings. He reiterated his Ministry's position as follows:

> "Given the economic and social choices that were available to this Ministry, we do not feel that it would have been reasonable, albeit it would have been more "lawful" to invoke the full force of all the terms and conditions of TFL #1. Doing so would have created a set of circumstances under which the company would have been forced to cease operations."

V. FINAL REPORT AND RECOMMENDATIONS

On June 27, 1985, I wrote to the Deputy Minister of Forests to report my final findings and recommendations. A copy of this letter was sent to Mr. Fulton, the President of Westar Timber Ltd.

It seemed to me that a number of assumptions were implicit in the Ministry's position that strict enforcement of all provisions of the Tree Farm Licence would force Westar to cease its operations and that it would be unlikely that any other company would be willing to take the financial risk of either buying out Westar or building a new pulpmill in the area.

First, I questioned whether a Tree Farm Licence was the most effective way to manage the forest resources within TFL #1. Second, I questioned the Ministry's assumption that Westar is a well-managed forest company and that no other forest concern could meet the Tree Farm Licence requirements and still remain profitable. Third, I wondered whether it was certain that, if Westar ceased operations, there would be no other forest company anxious to step in and conduct operations in the area. I was concerned that the Ministry of Forests had focussed solely on the short-term benefits of keeping Westar in operation and had failed to give adequate consideration, as it is required by the Ministry of Forests Act to do, to the long term economic and social benefits that the forests may provide to future citizens of our Province.

The following is a summary of my conclusions which I provided to the Ministry:

A. The Ministry of Forests acted improperly in not enforcing Westar's reforestation obligations under section 145 of the Forest Act and as established in Management and Working Plan #6.

B. The Ministry of Forests acted contrary to law in not fulfilling its statutory responsibilities under section 4 of the Ministry of Forests Act. The Ministry has neither encouraged the maximum productivity of the forest resources nor managed or conserved the forest resources having regard to the immediate and long-term economic and social benefits which they may confer on the Province.

C. Given its statutory responsibility under the Ministry of Forests Act, to manage and conserve the forest resource of the Crown, the Ministry of Forests will act improperly if it approves the 85% sawlog firmwood standard now proposed in Management and Working Plan #7.

D. The Ministry of Forests will be acting contrary to law if it approves the two components of the allowable annual cut (the allowable annual cut and the specified volume) as now proposed in Management and Working Plan #7.

E. The Ministry of Forests acted contrary to law in its approval of paragraph 4.05 of Instrument 90 which anticipates a management and working plan under which the licensee is permitted to harvest annually timber that is below the utilization standard used to calculate the allowable annual cut.

F. The Ministry of Forests acted contrary to law in fettering the Chief Forester's statutory authority to establish the allowable annual cut for the licence area.

G. The Ministry of Forests will be acting contrary to law if it bases Westar's annual rent for 1985 on only the sawlog component of the allowable annual cut now proposed in the latest draft of Management and Working Plan #7.

I recommended that the Ministry adopt one of two alternative recommendations to deal with this situation.

1. That the Ministry, pursuant to sections 59 and 60 of the Forest Act, suspend and, if the action required under the suspension order is not taken, cancel Westar's rights under Tree Farm Licence #1. I also recommended, if necessary in the short term, that action be taken to rectify the administrative errors I have outlined above in conclusions labelled A, E and F and that the proposed actions which I have criticized in conclusions labelled C, D and G not be taken.

Alternatively, if the Ministry does not consider it either appropriate or advisable to implement my first recommendation, I recommended

2. That the Ministry seek approval from Cabinet for the establishment of an independent body, such as a Royal Commission of Inquiry or a Select Committee of the Legislature, to conduct a comprehensive review of the Ministry's management of Tree Farm Licence #1 and of the proposed changes in Management and Working Plan #7.

It may be that such a forum would be the most appropriate way to allow for full and open discussion of all the relevant issues.

VI. CONCLUSION

At this point I have sent my recommendations to the Ministry and am awaiting its response. Judging from its response to my preliminary report, however, I am pessimistic that significant changes will result.

The issues which I have addressed in this complaint are complex and somewhat technical in nature in that they involve principles and practices of forest management. I am not a professional forester and I found the technical aspects difficult to understand and to analyze. My staff and I sought the assistance of professional foresters both within the Ministry of Forests and outside on numerous occasions to assist us by explaining and interpreting the information we had collected.

Having completed my investigation and analyzed the information I had collected, I was surprised at the results. It appeared to me that the Ministry had embarked upon a program of trading the forest resources of TFL #1 for only the tenuous expectation of continuing employment for some our citizens in return.

As Ombudsman, it is not my role to decide whether this policy is advisable. This is a political question and one which can only be

decided by the Government and the Legislative Assembly. It may well be that in this time of high unemployment, such an approach may be justifiable. It is certainly true that the majority of the forest resources within TFL #1 are overmature and decadent.

If, as Westar contends (and the Ministry of Forests seems to agree), the profile of the forest resources within TFL #1 are unique because of their overmaturity and resultant low value, perhaps a different form of tenure is required. I noticed in my review of Ministry files that Ministry employees had made various recommendations along this line: for example, it was suggested that in lieu of its Tree Farm Licence, Westar should be offered a Pulpwood Agreement in conjunction with a Timber Sale Licence; or a Forest Licence.

One of the options examined by the Strain-Davies Report was that the Ministry create a new type of forest tenure - a "Forest Rehabilitation Agreement." This type of tenure would ensure the harvest of the decadent timber within TFL #1 and thereby allow for the establishment of more valuable second growth timber. Under this type of tenure, the licensee would actually be paid by the Ministry to log off the decadent timber and to reforest the area. It appears to me that the Ministry is straining the rationale and the form of a tree farm licence tenure by splitting the harvest into sawlog and pulpwood components. If a tree farm licence cannot ensure good forest management within TFL #1 because of the decadent and low value timber, then perhaps the Ministry should seek

approval of the Legislature for the introduction of a new type of tenure.

It is, however, my role to review the Ministry's actions in light of its statutory mandate. In an apparent attempt to ensure the economic viability of Westar's operations and continued employment for some in the short term, the Ministry of Forests appears to be overlooking its responsibility to ensure that the forests are managed in such a way that they will continue to produce timber in the long term.

In my view, the Ministry's supervision of Westar's operations in TFL #1 does not meet its obligations to manage, protect and conserve the forest and range resources of the Crown, having regard to the immediate and the long term economic and social benefits they may confer on the Province. In adopting the approach that it has, I believe that the Ministry has failed in its statutory mandate to ensure that the forests are managed in such a way that they will continue to produce timber in the long-term.

With the standard of utilization which the Ministry has agreed to accept in which the good timber is taken and most of the pulp quality wood is left on the ground, and with the failure to ensure that harvested areas are properly reforested, I am afraid that in the not too distant future the forests of TFL #1 will have no economic value at all. When that happens, not only will Westar Timber Ltd. cease operations but no other forest company will be interested in operating in the area. In turn, there may be no employment for local communities. In my view, it is imperative that the Ministry acts quickly to correct this situation.

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PRELIMINARY REPORT*

May 17, 1985

DELIVERED BY HAND

Mr. A. Macpherson
Deputy Minister
Ministry of Forests
1450 Government Street
Victoria, B.C.

Dear Mr. Macpherson:

Earlier this year, I received a complaint from the Nishga Tribal Council concerning the Ministry of Forests and Tree Farm Licence (TFL) No. 1. It is the contention of the Nishga Tribal Council that the Ministry is not fulfilling its statutory responsibilities with regard to its supervision of Westar Timber Ltd., the licensee of Tree Farm Licence #1.

The Nishga Tribal Council has long been concerned about the forest resources of the Nass Valley since it is the homeland of the Native bands which constitute the Council. In 1983, after several unsuccessful attempts to obtain some sort of tenure over these forest resources and because of their concern that the forest resources in the area were not being managed properly, the Nishga approached my office with their complaint about the Ministry of Forests' management of the forest resources within Tree Farm Licence #1.

* Pursuant to section 16 of the Ombudsman Act, R.S.B.C. 1979, c. 306:

> "Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter."

My preliminary findings in this case are based on information discovered on Ministry files during the course of this investigation. However, my primary focus in undertaking this investigation is not to question the hundreds of individual decisions made by Ministry employees in carrying out the Ministry's role in supervising the management of the forest resources which comprise Tree Farm Licence #1. Rather, my focus is to investigate concerns relating to your Ministry's general performance in fulfilling its statutory responsibilities in the context of its legislative mandate. This approach, of necessity, requires a review of Westar's forest management practices and it is for this reason that I have provided Westar with a copy of this preliminary report and invited the Company to make representations to me before I reach a decision on the validity of the complaint.

In this investigation, I have reviewed your Ministry's actions as they related to Tree Farm Licence #1 primarily for the period since 1979, at which time Management and Working Plan #6 came into effect. I might also mention at this point that I appreciate that the licensee company and its predecessor companies have gone through a number of name changes in recent years, from Canadian Cellulose Co. to B. C. Timber Co. and now to Westar Timber. For ease of reference, I have referred to the Company as "Westar".

This preliminary report is divided into the following categories:

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I. The Law and Ministry Policy respecting Tree Farm Licences

Before examining forest management practices in Tree Farm Licence #1 and the Ministry's supervision thereof, it may be useful to outline the nature of the legal relationship between the Ministry and Westar and the rights and responsibilities which accrue to each. I have, below, set out the law and Ministry policy which creates and controls this relationship.

Section 4 of the Ministry of Forests Act establishes the purposes and functions of the Ministry. It is the responsibility of the Minister to:

> "(a) encourage maximum productivity of the forest and range resources in the Province;
> (b) manage, protect and conserve the forest and range resources of the Crown, having regard to the immediate and long term economic and social benefits they may confer on the Province;
> (c) plan the use of the forest and range resources of the Crown, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the Crown and with the private sector;
> (d) encourage a vigorous, efficient and world competitive timber processing industry in the Province; and
> (e) assert the financial interest of the Crown in its forest and range resources in a systematic and equitable manner."

Section 27(5)(b) of the Forest Act provides that the Minister shall evaluate an application for a tree farm licence on the basis of the following criteria:

> "(a) creating or maintaining employment opportunities and other social benefits in the Province;
> (b) providing for the management and utilization of Crown timber;
> (c) furthering the development objectives of the Crown;
> (d) meeting the objectives of the Crown in respect of environmental quality and the management of water, fisheries and wildlife resources; and,
> (e) contributing to Crown revenues."

Section 27(7) of the Forest Act provides that the Minister may not grant a tree farm licence until the Chief Forester has approved a management and working plan for the proposed tree farm licence area.

Section 28(d) of the Forest Act requires a licence holder to submit a management and working plan to the Chief Forester at least once every five years. Among other things, the working plan must contain "a proposal for reforesting and providing other silvicultural treatments to the tree farm licence area".

Section 28(g) requires the Chief Forester to approve "management and working plans acceptable to him", that specify

> "(i) an allowable annual cut that he determines may be sustained from the tree farm licence area, having regard to
>
> (A) the composition of the forest on the tree farm licence area and its expected rate of growth, determined from an inventory of the forest;
> (B) the expected time that it will take the forest to become re-established on the tree farm licence area following denudation;
> (C) silvicultural treatments to be applied to the tree farm licence area;
> (D) the standard of timber utilization and the allowances for decay, waste and breakage it is expected will be applied with respect to timber harvesting operations conducted on the tree farm licence area; and
> (E) any other information that relates to the capability of the tree farm licence to produce timber; and
>
> (ii) measures taken and to be taken by the holder of the tree farm licence, consistent with the tree farm licence, this Act and the regulations, for developing, protecting, restoring and improving the forest resources in the tree farm licence area; . . . ." (my emphasis)

Paragraph 2.08 of Tree Farm Licence #1 states that "a management and working plan shall be deemed to be a part of, and shall be consistent with, this Licence."

The Ministry's Timber Management Manual (formerly section 21.311, now chapter 8) sets out the Ministry's objectives in issuing tree farm licences:

> "Objectives
>
> The "Tree-farm Licence" is a form of tenure managed by the tree-farm licensee with constant supervision by the Forest Service. Under this licence, the licensee is able to retain, for

the purpose of growing timber crops, lands on which he may have only the right to harvest existing mature stands; and the licensee may be given the use of additional Crown forest lands.

The main objectives are:

(a) rational, sustained-yield management of forest lands to produce the greatest possible return in wood, subject to environmental constraints;
(b) stabilization and perpetuation of industry and communities.

The licensee is required to manage his licence land in accordance with these principles."

I turn now to examine the issues raised in the complaint and to set out my preliminary findings on each of these issues.

II. Reforestation

The Law and the Licence Agreement

Section 28(d)(iv) of the Forest Act requires the holder of a Tree Farm Licence to submit to the Chief Forester for his approval a Management and Working Plan which contains a proposal for reforesting and providing other silvicultural treatments to the tree farm licence area.

Under section 28(g)(ii), the Chief Forester is required to include in the Management and Working Plan details of the measures, acceptable to him, which the licencee will undertake in order to develop, protect, restore and improve the forest resources in the tree farm licence area.

Further, section 145 of the Forest Act provides that:

"A person who harvests Crown timber under an agreement entered into under this or the former Act shall establish a crop of commercially valuable species of timber on the area in the manner and to the standards provided

(a) in the agreement, if the agreement so provides; or
(b) in the regulations, if the agreement does not so provide, unless he obtains an exemption from the regional manager or district manager."

Section 88(2) of the Forest Act provides that

"Where, under an agreement made under this or the former Act,

(a) a person performs on Crown land work that is not considered in the determination of stumpage rates by
  (i) constructing a logging access road,
  (ii) applying reforestation or other silvicultural treatment, or
  (iii) carrying out another responsibility,
(b) the work is approved in advance by the regional manager,
(c) all or part of the expense of performing the work, or a formula for ascertaining the expense, is approved by the regional manager, and
(d) the work is performed to the satisfaction of the regional manager, the expense that is approved, or that is ascertained according to the formula, shall be applied as a credit against stumpage payable by the person in respect of timber harvested in a prescribed area of the Province." (my emphasis)

The Chief Forester approved Managament and Working Plan #6 for the period of 1979 - 1983. In it, Westar committed itself to take the following measures concerning reforestation:

> - "The primary objective will be to regenerate logged areas within a five-year period from the date of denudation. Areas expected to regenerate naturally will be examined three years after logging, and areas where restocking problems are anticipated will be inspected within one year after logging."
>
> - "The reforestation of outstanding N.S.R. [Not Satisfactorily Restocked] areas which are indicated to require planting will be dependent on the availability of suitable planting stock. A plan for the reforestation of these areas over the term of the Working Plan will be submitted for the approval of the District Forester and to establish seedling requirements during this period."
>
> - "Establishment of survival plots will be made at time of planting. Re-examination will occur after two growing seasons. Areas with excessive seedling mortality will be considered for replanting." (Section 5.4)

Section 5.42 of Management and Working Plan #6 deals with stand improvement. After outlining the objectives of the Stand Improvement Program and enumerating the criteria which must be established to develop this program, the Management and Working Plan states:

> "A definitive 5-year stand improvement program cannot be formulated until the above criteria are properly researched and answered. In addition, the important aspect of funding such a program must be determined and the cost implications to the company assessed. Until such time as the new Forest Act and its regulations are proclaimed and the funding under Section 88 of this act clarified, it is not possible to provide a 5-year commitment to a stand improvement program."

"A program for stand improvement for the last four years of the Working Plan period will be submitted for your consideration by March 1, 1980, based on the 1979 surveys and the available funding."

Finally, paragraph 12.03 of TFL No. 1 states that:

"Where the Licensee fails to perform an obligation it is required to perform under this Licence, a management and working plan...

(a) the Regional Manager or a Forest Officer authorized by him may perform the obligation on the Licensee's behalf, and
(b) the Licensee will on demand pay the Crown an amount of money equal to the reasonable costs incurred under subparagraph (a) to perform the obligation.

Information Obtained from Ministry Sources

1. Mr. J. Blickert, Smithers Regional Manager, in a letter dated December 5, 1979, stated that "cursory field examinations of the Nass River plantations of TFL No. 1 indicate that extensive plantation failures have occurred. The main cause appears to be lack of appropriate plantation maintenance in brush sites".

2. In response to a question put by my investigator, Mr. B. Downie, Regional Staff Manager, advised in a March 14, 1985 letter to Mr. J. Juhasz, the Director of Timber Management, as follows:

"Further follow-up discussions with B C Timber [now Westar] were conducted after W. Young's [then Chief Forester] letter of February 9, 1979. However, no reforestation schedule or Stand Improvement schedule was developed by B C Timber nor approved by the Ministry of Forests. The company did start to prepare for and embark upon a modest juvenile spacing program. This program was cancelled in 1981 by the company. . . ."

Some of the reasons given by Mr. Downie for the cancellation were "a build-up of section 88 credits", "industry strikes and work stoppages", "a turn down in the economy", "lack of corporate level support to fund the programs in poor market conditions", "in 1982, the Ministry of Forests removed all intensive goals and section 88 funding from its approved five-year silviculture program", and "the quality of timber on TFL No. 1 does not generate enough stumpage to pay for all the work required to meet the conditions of the TFL agreement."

Mr. Downie states that backlog reforestation plans which Westar had committed itself to submit in the Management and Working Plan were cancelled for the same reasons. I have seen no information to indicate that subsequent reforestation programs were implemented to replace those which had been cancelled.

Mr. Downie also provided the following data:

Silviculture Achievements on T.F.L. #1
Funded as Licensee Responsibility Under Section 88

	1979	1980	1981	1982	1983
Regeneration Surveys	4541ha	4332ha	2130ha	1226ha	1484ha
Area Satisfactorily Restocked	2833ha	1720ha	832ha	810ha	857ha

Of the 13,713 ha. subjected to a regeneration survey, only 7,052 ha. were found to be satisfactorily restocked. In other words, 6,661 ha. or 48.58% of the area surveyed was not satisfactorily restocked.

3. Page 18 of the December, 1983 "Supplement III to the Strain-Davies Report on B.C. Timber's Northern Operations" states that:

> There is a major silviculture backlog on T.F.L. 1. . . . Recent estimates based on 10,000 ha. identified in M.W.P. 7 for T.F.L. 1 were $12,000,000 for reforestating [sic] this backlog NSR to the "free to grow state".

4. Westar argued, in its first draft of Manangement and Working Plan # 7 (initially intended to be effective as of January 1, 1984 and still not yet approved), that it does not have enough Section 88 credits in order to commit itself to an adequate reforestation program. Following his discussions with Westar officials, Mr. W. Young, then Chief Forester, stated in his October 19, 1982 letter to Mr. J. Blickert, Smithers Regional Manager, that

> "1. The MWP is not the place to address financing policy.
> 2. The MWP will outline the silviculture needs and comment on the priorization of these.
> 3. Priorization will be given to Basic Silviculture which is mandatory under the tenure (my emphasis). I believe that the following two priorities are of equal priority and should be rated first:
>
> a) restocking of logged areas (includes site preparation, planting, natural regeneration)
> b) ensuring that plantations reach a "free-growing" state."

5. On November 16, 1984, Mr. G. Lloyd, a Silviculture Officer in Smithers, sent a memo to Regional Manager, Mr. K. Ingram, outlining the silviculture status on the area of land which your Ministry removed from Tree Farm Licence #1 (at Westar's request) in February of 1985, as follows:

"Harvested, 1970-1983	4,100 ha.
Total planted	1,100 ha.
Total natural regeneration	500 ha.
Total indicated NSR	2,500 ha."

In other words, 60% of this logged area was Not Satisfactorily Restocked.

Mr. Lloyd went on to say that "the total cost required to bring the 4,100 ha. to a free growing status is $3,685,771."

6. Mr. R. Jones, the Silviculture Manager of the Silviculture Branch, sent a memo to Mr. J. Juhasz, the Director of the Timber Management Branch on December 12, 1984. After noting that Management and Working Plan #6 would have been in effect when harvesting occurred in the Northern portion of the Tree Farm Licence area, Mr. Jones brought section 5.41 of the Working Plan to Mr. Juhasz's attention, as follows:

> "Each cutting permit application will establish the silvicultural objectives for each cut block on a site-specific basis" and "the primary objective will be to regenerate logged areas within a five-year period from the date of denudation" and "survival plots will be made at the time of planting. Re-examinations will occur after two growing seasons."

Mr. Jones recommended that it was "imperative that such obligations be embodied in the instrument that has been drawn up to amend TFL 1". Instrument 90, which effected the deletion of the northern portion of the Tree Farm Licence area, did not contain any reference to Westar's obligation to fulfill its silvicultural responsibilities. I have been unable to find any information which would indicate that your Ministry obtained any guarantees from Westar that this area would be properly reforested.

Question #1: Prior to signing Instrument 90, which removed the northern area from Tree Farm Licence #1, did your Ministry obtain any enforceable undertakings from Westar to ensure that that deleted area would be properly reforested as required by Management and Working Plan #6? If so, what specific obligations currently exist with respect to reforestation of the areas deleted?

7. Mr. J. Bullen, Manager of Resource Planning Section, in a January 31, 1985 letter to Mr. J. Juhasz, Director of Timber Management Branch, stated that approval of the licensee's proposed 85% utilization standard would

> "intensify short-term reforestation problems. Either reforestation costs or regeneration delays will increase. Furthermore, the licensee has stated in the MWP that he will only obligate himself to basic forest management to the extent that funds permit. . . ."

8. In a memo dated February 12, 1985, D.A. Robb, Forester in the Resource Planning Section of the Planning and Inventory Branch, comments on Management and Working Plan No. 7 in part as follows:

> "Management Goal No. 2 states that the licensee will only commit himself to basic forestry to the extent funding is available. As far as we are aware, basic silviculture must be accomplished on the TFLs regardless of the availability of funding under section 84 or 88 of the Forest Act. . . .
>
> This entire section (silviculture) ignores the major issue of the MWP, being that if a utilization standard of 85% firmwood sawlog quality is implemented, excess logging debris will remain on the cutover area. The result will be increasing silviculture costs or longer regeneration delays."(my emphasis)

9. The 85% firmwood sawlog quality utilization standard, which gave rise to such concern on the part of some Ministry employees, was approved by your Minister in the latter part of 1984. (This is discussed later in the section entitled "Utilization".)

Preliminary Findings

The above extracts from the Ministry's files suggest to me that the Ministry of Forests may not have fulfilled its legislative responsibilities of ensuring that effective and adequate reforestation practices were taking place on Tree Farm Licence #1 since 1979.

During a regeneration lag, the forest site is not producing wood fibre. As I understand it, one of the causes of regeneration lags is the lack of planning for harvesting and reforestation together before harvesting occurs.

While Management and Working Plan #6 commits Westar to a 5-year regeneration period, information from your Ministry appear to indicate a much greater lag. It seems then that Westar is behind the schedule for regeneration approved by the Chief Forester. Nevertheless, even though a Ministry employee reported that plantation failures were extensive in the tree farm licence area (#1 above), Management and Working Plan No. 6 has been twice extended. It is now in effect until the end of 1985.

Question #2: Has the Ministry taken any action, as it is empowered to do under section 12.03 of the Licence, to perform the silviculture necessary to reduce the regeneration lag to the required five year period, and, if not, does it intend to in the future? If such action has been taken, has Westar been billed the "reasonable costs incurred" and how much were those costs?

It seems that silviculture employees in your Ministry were concerned about Westar's poor performance of its silvicultural responsibilities on the Northern portion of its Tree Farm Licence area. Despite Mr. Jones' recommendation (#6 above), Westar's obligations were not included in Instrument 90 (which amended Tree Farm Licence #1). Nor was my staff able to find any reference on Ministry files to Westar's silvicultural obligations on the deleted Northern portion.

From my reading of the Forest Act, then Chief Forester Mr. Young and Resources Planner Mr. Robb, were correct in asserting that basic silviculture is mandatory under the Forest Act and must be carried out regardless of funding under section 88 (#4 and #8 above). It appears to me that while Westar may apply to set off its reforestation costs against the stumpage charges assessed against it by the Crown, Westar cannot decline to carry out its reforestation responsibilities for the reason that it does not have any stumpage charges to be set off. If this were the case, we would be left with a situation in which Tree Farm Licensees would never have to pay stumpage to the Crown. Yet in 1985, Mr. Downie cites such matters as section 88 credits and Westar's economic difficulties as reasons for the cancellation of its juvenile spacing and backlog reforestation programs (#2 above).

Question #3: After set-off for section 88 credits, how much stumpage has Westar actually paid to the Crown for timber harvested from Tree Farm Licence #1 since Management and Working Plan #6 came into effect in 1979?

It appears to me that the Ministry may have acted improperly in not enforcing Westar's reforestation obligations under section 145 of the Forest Act and as enumerated in Management and Working Plan #6. As outlined above, the Management and Working Plan is considered to be part of the tree farm licence itself. A tree farm licence grants to its holder extensive timber harvesting rights of a public resource. The Licence and the Management and Working Plan outline the licensee's

obligations and responsibilities. By extending Management and Working Plan #6 despite the fact that Westar is apparently eight years behind its reforestation obligations, and by accepting Westar's financial difficulties as justification for its failure to fulfil its silviculture responsibilities, the Ministry appears to have been remiss in implementing its mandate to manage the forest resources of this Province.

More generally, it appears to me that the Ministry may have acted contrary to law in not fulfilling its legislative responsibilities under section 4 of the Ministry of Forests Act to encourage maximum productivity of the forest resources and to manage and conserve the forest resources, having regard to the immediate and long term economic and social benefits which they may confer.

I should note at this juncture that the complainants allege that there has been substantial degradation of much of the soil in the areas which had been logged. Unnecessary soil disturbance apparently reduces the productivity of forest land and is therefore something to be avoided during logging operations. I could find no indication in any of your Ministry's agreements with Westar that your Ministry had required Westar to conduct its operations in such a way so as to avoid unnecessary soil disturbance.

III. Utilization

A. Past Utilization Issues

Your Ministry's Chief Forester established the allowable annual cut, over the past three decades, for Tree Farm Licence #1 as follows:

Year	AAC(m3)
1952	347 360
1953-1956	410 600
1957-1963	622 970
1964	807 030
1965-1967	991 100
1968	1 234 620
1970-1978	2 038 820
1979 and later	1 291 560

The large increase in 1970 occurred when former Tree Farm Licence #40 was amalgamated with Tree Farm Licence #1 and the allowable annual cuts were combined. However, it appears that no significant development occurred in the areas previously contained in the Licence #40 area: in a meeting with my staff, you described logging in that area as "minimal". It appears therefore that the substantially increased allowable annual cut permitted Westar to increase its annual harvest of the easily accessed, high quality stands of the Nass River bottomlands.

As I understand it, a long term forest management plan should balance logging operations over the different forest sites within the licence area. Such an approach would harvest timber from difficult to access sites with lower quality timber as well as from easily accessed sites with high quality timber. In turn, that approach ensures both that timber harvesting over the long term remains economic and that both high and low quality stands of timber are rehabilitated.

It appears to me that Westar, with the specific authority of your Ministry through the granting of cutting permits, has pursued a "highgrading" pattern of development in the Tree Farm Licence #1 area for many years. This preliminary conclusion is supported in the Ministry's "Forest and Range Resource Analysis, 1984". Page I - 10 of that Analysis states that as "logging operations are largely confined to timber with the highest net value, ...the high value end of the supply is being depleted". The Analysis goes on to say that "relaxed utilization standards aggravate this problem by increasing the area cut to attain the same volume of harvest".

While I have not investigated these issues pertaining to past utilization, I mention them because it appears to me that approval of the proposed 85% firmwood sawlog standard will result in an even more accelerated highgrading pattern of development. This issue is discussed in greater detail below.

B. Future Utilization Issues

In response to the complaints of the Nishga Tribal Council, my staff reviewed Ministry files to examine the Ministry of Forests' enforcement of Westar's obligations. This review of Ministry files brought to my attention the fact that significant changes regarding the allowable annual cut and utilization standards have recently been proposed by Westar. While I realize that Management and Working Plan #7 has yet to be formally approved, it appears that your Ministry's position on these two issues has already been determined. I have also some concerns arising from some of the amendments to the Tree Farm Licence embodied in Instrument 90, which was effective as of January 1, 1985.

The Law and the Licence Agreement

Section 28(g)(i)(D) of the Forest Act requires the Chief Forester to approve a Management and Working Plan acceptable to him that specifies an allowable annual cut which can be permanently sustained having regard to the composition of the forest and its rate of growth, the regeneration lag, silvicultural treatments to be applied, the standard of timber utilization, and any other information that relates to the capability of the tree farm licence area to produce timber. He must also take into account measures taken, and to be taken, by the licensee in improving the forest resources of the licence area.

Section 4.00 of Tree Farm Licence #1, entitled "Cut Control", requires Westar to harvest an amount of timber within 50% of the allowable annual cut each year and within 10% averaged over a specified five year period. Management and Working Plan #6, which was approved by the Chief Forester for the years 1979 - 1983, inclusive, has twice been extended and is now in effect until the end of 1985. The annual allowable cut as established by the Chief Forester in that document is 1 291 560 cubic metres. Sections 4.03 and 4.04 of the Licence document provide that Westar must pay damages to the Crown if it cuts more than the amounts specified above.

Instrument 90 (the latest agreement between the Ministry and Westar), signed by your Minister on February 12, 1985, was retroactively effective to January 1, 1985. Point 2 of Instrument 90 states that the Tree Farm Licence is amended by adding a new paragraph 4.05, as follows:

> Where a management and working plan permits the Licensee to harvest annually timber that is below the utilization standards used to calculate the allowable annual cut, up to a specified volume in addition to the allowable annual cut (the "specified volume")
> (a) Liquidated damages will not be assessed
> (i) under paragraph 4.03, unless and to the extent that the volume of timber harvested in a calenlar year exceeds 150 percent of the total of the allowable annual cut and the specified volume, or
> (ii) under paragraph 4.04, unless and to the extent that the volume of timber harvested in a 5 year cut control period exceeds 110 percent of the total of the 5 year allowable cut and 5 times the specified volume, and
> (b) the allowable annual cut only shall be taken into account for the purposes of paragraph 4.02(a)(ii) and (b)(ii), of section 55 of the Forest Act, and of calculating annual rent payable by the Licensee in respect of this Licence under the Forest Act.

The April 29, 1985 draft of Management and Working Plan #7 provides that:

> The annual rate of harvest has been set at 360,000 m3 based on 85% firmwood sawlog quality. In addition, the Licensee intends to harvest a minimum 150,000 m3 below 85% firmwood sawlog quality annually during the term of MWP 7. This additional volume is subject to market demand.

Appendix V-16 of the April 29, 1985 draft of Plan #7 states:

> The AAC under MWP 7 is composed of two components:

i) the sawlog AAC component which is to be calculated on an 85% firmwood sawlog standard. Annual rent and minimum cut control obligations are based on the sawlog AAC.

ii) The pulplog component which falls below standards.

Information obtained from Ministry Sources

10. Following are some relevant extracts from the Davies-Strain Report which was submitted to Deputy Minister Apsey on May 19, 1983:

> - BCT [Westar] mills are not capable of processing the forest profile (i.e., saw-timber and pulplogs) in the most efficient manner. (p.3)
>
> - at least 60 - 65% of Watson Island's furnish must come in the form of roundwood pulp. (p.3).
>
> - The viability of BCT's northern operations is tied directly to the success or failure of the Watson Island pulpmill. The Watson Island mill receives a higher percentage of its furnish in the form of roundwood pulp than other mills in B.C. A significant cost disadvantage is associated with the use of roundwood pulp vis-a-vis by-product chips. The cost of this furnish must be reduced if the Company is to be more viable than at present. (p.7)
>
> Page 19 of "Supplement III to the Strain-Davies Report states that "whole log chips were approximately twice the cost of residual chips."

11. In response to this Report, Mr. J. Juhasz, the Director of Timber Management, wrote to Assistant Deputy Minister MacPherson on May 26, 1983 that

> My considered opinion then is that if the company [B.C.Timber] cannot operate their pulp mill at 1150 tpd at Watson Island, they should operate it at a lower level, and write off as a loss what appears to have been a poor investment.
>
> ...the company made a plainly bad investment decision, and it should write off the investment as a loss, rather than asking the public to turn it into a profitable one through subsidies.
>
> I am convinced that our province cannot afford subsidizing the forest industry.

12. In a letter dated February 10, 1984, Westar submitted several proposals for Management and Working Plan #7 to Mr. A. MacPherson, then Assistant Deputy Minister. One of these proposals was to reduce the annual allowable cut to an 85% firmwood standard for sawlogs.

13. In response to these proposals, then Deputy Minister Apsey wrote to your Minister on February 22, 1984 stating that:

> "What they would have is an area-based tenure with us paying the bills. B.C. Timber appears to want to have their cake (area-based tenure) and to eat it too (no responsibilities of a TFL). I do not believe we should subsidize their operation...".

Mr. Apsey recommended to your Minister that the licensee be granted a Forest Licence (instead of its Tree Farm Licence).

14. On April 27, 1984, the Westar wrote to Assistant Deputy Minister, Mr. A. MacPherson, that it did not wish to relinquish its Tree Farm Licence.

Westar wrote to the then Assistant Deputy Minister on May 16, 1984, that "We understand there to be agreement in principle to the following points:". Among the items listed was

> "3. Revision of utilization standards for inclusion in the TFL contract so that subsequent calculation of the allowable annual cut for TFL would reflect an AAC basically of sawlog capacity. . . . Pulp quality timber would be removed concurrent with sawlogs up to the sustained yield volume of the licence at the licensee's option. . . ."

15. On July 25, 1984, and during that period in which Westar was negotiating with your Ministry for a reduction in the size of Tree Farm Licence #1, your Minister informed Westar that the 85% sawlog standard was acceptable provided that:

- "the AAC of the reduced area licence is calculated on these standards;
- the company is prepared to remove at least 150 000 m^3 of wood below that standard each year; and
- it is understood I have reserved the right to enter into timber sale agreements within the licence area with anyone who wishes to remove pulpwood, being that wood below the 85% firmwood sawlog standard."

Further, the Minister stated that he would present Cabinet with Orders-in-Council to establish stumpage at the minimum rate, permitted by statute, for sawlogs and at 10¢ per m^3 for pulpwood.

16. Mr. J.A.K. Reid, Executive Director, Legislation and Policy, in a December 18, 1984 confidential memo to Mr. A. MacPherson, Deputy Minister, stated as follows:

> "In response to the Minister's letters, the Company has submitted a proposed agreement to incorporate the proprosals into the TFL agreement. Those TFL changes would:
>
> a) revise the boundaries;
>
> b) base the annual rent on the sawlog AAC specified in the MWP;
>
> c) require that the minimum volume to be harvested be based on the sawlog AAC but the maximum be the total of the sawlog AAC and the "option volume" of pulpwood. (The annual cut could range from 180 000 to 765 000 m^3);
>
> d) authorize the granting of TSL to other parties subject to certain limitations and constraints.
>
> The Company proposal gives rise to some potential conflicts with the Forest Act:
>
> 1) it would fetter the Chief Forester's determination of an AAC as required under section 28(g)(i)(D) of the Act;
>
> 2) it provides either for two AAC's for the TFL or for a division of the AAC for rental and cut control purposes (the Act provides for only one AAC which must be used for the rent calculation);
>
> 3) it would fetter the Minister's discretionary powers to sell timber to others under the Act.
>
> We would prefer to limit the TFL amendments only to the boundaries and to an authorization to sell timber to other parties, and to include any other necessary points in separate letter and/or memorandum of agreement.
>
> There is also concern about the suggested utilization standard. It appears that the Minister may have agreed to the "85 percent firmwood sawlog standard" in the belief that the relaxed utilization standard (as presently being

practised on the two TLs) is nearly equivalent to that 85% standard. Chris Kindt advises that this appears to be a misconception as the relaxed utilization standards are closer to a 65% firmwood. The difference looms rather large in terms of the AAC, as revealed in the following rough estimates (based only on the proportion of the 32.5% reduction in area).

Indicated AAC Effects

Utilization Standard	Whole TFL	Reduced TFL
Present Close Utilization (50% firmwood)	1 200 000 m^3	800 000 m^3
Relaxed Utilization (65% firmwood)	900 000 m^3	600 000 m^3
Proposed S/L Utilization (85% firmwood sawlog)	?	360 000 m^3

These crude "ball park" estimates indicate that, on the basis of the Company estimate of 360 000 m^3 AAC at the 85% firmwood sawlog utilization, there would be some 240 000 m^3 additional volume to the present relaxed utilization level and 440 000 m^3 to the normally assumed close utilization level."

17. Mr. J.G. Bullen, Manager, Resource Planning Section, sent a memo dated January 31, 1985 expressing his and his staff's concerns to Mr. J. Juhasz, Director, Timber Management Branch. Mr. Bullen wrote that:

> "the single option which has been examined (namely, the proposed 85% firmwood sawlog standard) does not represent a sufficient range of options to provide the Chief Forester with an adequate basis for setting the AAC. At issue, then is that the licensee's proposed AAC (360 000 m^3) plus an additional pulpwood harvest (150 000 m^3) will result in a rate of harvest below LRSY [Long range sustained yield].
>
> The Forest Service position to date, on the setting of AACs in management units which contain a large amount of old growth timber, has been to set a rate of harvest which will accelerate the removal of the old growth. This position is intended to facilitate the establishment of thrifty second growth timber and lead to a more balanced age class structure in the future. From a <u>forest management</u> viewpoint, setting a

rate of harvest on the basis of Westar's proposed utilization standard will:

a) intensify short-term reforestation problems. Either reforestation costs or regeneration delays will increase.

b) accentuate the present decadence, in the overmature forests. Continued harvesting below the LRSY will lead to even greater utilization problems in the future.

18. On February 13, 1985, Mr. J.G. Bullen, Manager of the Resource Planning Section, stated in a memo to Mr. R. Robbins, Chief Forester that:

> "It is the Chief Forester's responsibility to approve a utilization standard as part of the MWP, in accordance with Section 28(g)(i)(D) of the Forest Act. Before our Feb 22/85 meeting with Westar to discuss their MWP, we require your direction with respect to the following items:
>
> 1. Will you approve an MWP that proposes an AAC on the basis of an 85% sawlog utilization standard? This sawlog utilization standard, as proposed, is expected to reduce the AAC to 360 000 m^3, thereby reducing the annual rent payable to the Crown."
>
> 2. Will you approve an MWP that proposes a "total sustained yield capacity" as the rate of harvest? This term, as specified on the attached agreement, is based on a 50% firmwood utilization standard and is estimated to be 765 000 m3 by the licensee.

In a handwritten note at the bottom of the memo, the Chief Forester replied "Yes I will approve because I have no option. Please proceed."

Preliminary Findings

While I recognize that Management and Working Plan #7 has not yet been approved by your Ministry, it appears that the 85% firmwood sawlog standard is acceptable to your Ministry. Instrument 90, which was executed on February 12, 1985, anticipates a management and working plan in which the licensee is permitted to harvest timber below the utilization standards used to calculate the allowable annual cut. And indeed, Plan #7 commits Westar to harvest 360,000 m3 of 85% firmwood

sawlog quality timber while permitting, but not requiring, Westar to harvest additional amounts of pulpwood subject to market demand.

a) 85% firmwood sawlog standard

As pointed out by Mr. Reid in his memo to Mr. MacPherson (#16 above), it appears that your Ministry may have agreed to the 85% standard in the mistaken belief that the figure represented the then current relaxed utilization standards. Apparently, Chris Kindt had advised that the then current relaxed standards were closer to 65% firmwood. Mr. Kindt's statements suggest to me that the 85% standard may have been approved by your Ministry based in whole or in part on a mistake of fact.

b) Utilization

"Allowable annual cut" is defined in section 1 as "a rate of timber harvesting specified for an area of land." As I understand it, before the allowable annual cut can be specified, other calculations must first be made. The rotation period refers to the number of years required for new stand growth so as to maximize the average annual rate of wood growth. After the rotation period is determined, it is possible to estimate the Long Run Sustained Yield, or the rate of harvesting that is sustainable for the long term of a particular area of forest land. I believe that theoretically each year's harvest is replaced by each year's usuable growth. The difference between growth and yield must here be noted: growth represents the total plant while yield is only the portion of the tree which can be utilized. The allowable annual cut, then, is the volume of timber which may be harvested each year while sustaining a perpetual, approximately even flow of timber volume from a specific area.

The standard of utilization is set by Ministry Policy and included in the tree farm licence, the management and working plan, and in the individual cutting permits. The utilization standards set the obligatory diameters by species which must be harvested. As I understand it, these standards are set to ensure that the predetermined, desired levels of harvesting will be realized.

As outlined above, the Long Run Sustained Yield is a rate of harvest which can be sustained for the long term. As stated at Appendix V-14 of Management and Working Plan #7,

> The level of harvest chosen for each simulation run is the key to the whole analysis.

As illustrated in Appendix V-25, the level of harvest for the next fifty years is estimated at 765,000 m3. Westar is only obligated to harvest 360,000 m3 of 85% firmwood sawlog standard. From my reading of Plan #7, there is no absolute obligation on Westar to harvest any pulpwood. As outlined above, Westar will not be in an undercut position unless it cuts below the permitted variance of the 360,000 m3. In other words, there are no repercussions if Westar does not harvest any pulpwood. Instrument 90 permits the Regional Manager to enter into Timber Sale Licenses with persons other than Westar. However, such agreements are subject to Westar's estimate of the amount of timber which it will harvest during the balance of the year or the five year cut control period. If Westar does not estimate that it will harvest the total sustained yield capacity, it is possible that there will not be other persons interested in harvesting this amount of pulpwood. In other words, there is no guarantee that the 405,000 m3 of pulpwood will actually be harvested. Hence, it seems to me that the figure of 765,000 m3, which as Plan #7 states "is the key to the whole analysis", has no validity as Westar is only responsible for harvesting 360,000 m3 and no one else is responsible for harvesting the remainder. Furthermore, the 360,000 m3 which Westar will be harvesting is timber that is 85% sound (or greater). Approval of this utilization standard will permit Westar to not only continue but to accelerate what appears to have been a highgrading pattern of development in this tree farm licence area.

It is my understanding that the forest resources of TFL #1 are overmature and decadent. It would seem to me then that good forest management would accelerate the harvesting of this old growth so that a more valuable second growth can be established. Yet it appears that Plan #7 will commit Westar only to harvesting 360 000 m3 of 85% firmwood of sawlog standard. As pointed out by Mr. Bullen (see # 17 above), approval of this standard will intensify short-term reforestation problems and accentuate the present decadence in the overmature forests.

Hence, given its statutory responsibilities under the Ministry of Forest Act to manage and conserve the forest resources of the Crown, having regard to the immediate and long term economic and social benefits they may confer on the Province, it appears to me that the Ministry of Forests may be acting improperly if it approves the utilization standards as set out in Management and Working Plan #7.

c) Allowable Annual Cut

My understanding of section 1 of the Forest Act is that the term "allowable annual cut" refers to a rate of harvest specified for an area of land. Section 28(g) requires the Chief Forester to approve

an allowable annual cut after considering the enumerated criteria, one of which is the standard of timber utilization. Management and Working Plan #7, now in its third draft, states that the 360,000 m3 of 85% sound wood is the allowable annual cut. Yet the Plan purports to allow Westar the option of harvesting additional pulpwood up to the maximum annual harvest of 765,000 m3. Such a scheme appears to me to be both a manipulation and a contravention of the Forest Act.

In this regard, I find myself in agreement with Mr. Reid's sentiments as outlined in #16 above.

As mentioned above, Instrument 90 was signed on February 12, 1985 but made retroactively effective as of January 1, 1985. This agreement between your Ministry and Westar appears to envision two allowable annual cuts as paragraph 4.05 refers not only to an allowable annual cut but also to an amount which the licensee can harvest which is below the utilization standards used to calculate the allowable annual cut.

Appendix V-16 of the April 29, 1985 draft of Plan #7 states:

> The AAC under MWP 7 is composed of two components:
>
> i) the sawlog AAC component which is to be calculated on an 85% firmwood sawlog standard. Annual rent and minimum cut control obligations are based on the sawlog AAC.
>
> ii) The pulplog component which falls below standards.

The Appendix goes on to state that for purposes of liquidated damages (assessed against the licensee in overcut situations), the operative figure will be the total sustained yield capacity of the licence, i.e. 765,000.

Many different sections of the Forest Act and paragraphs of Tree Farm Licence #1 refer to the "allowable annual cut", as follows:

a) Paragraph 4.03 of the Licence addresses the situation in which the licensee cuts more than 150% of the AAC during a calendar year, and the amount of liquidated damages he must then pay the Crown;

b) Paragraph 4.04 of the Licence addresses the situation in which the licensee cuts more than 110% of the AAC during a five year cut control period, and the amount of liquidated damages he must then pay the Crown;

c) Paragrapah 4.02 of the Licence refers to the permissible range of harvest in relation to the specified AAC both for a calendar year and for a five year cut control period; and,

d) Section 90 of the Forest Act sets out the method for calculating a licensee's rent based on his AAC.

It is interesting to note that in situations a & b above, the relevant figure is 765,000 m3 while in situations c & d above, the relevant figure is 360,000 m3. All of these provisions refer to the "allowable annual cut" - yet in each situation, the figure which produces the most favourable result to the licensee is used. It appears to me from this analysis that there are in fact two AAC's and that approval of Plan #7 in its present form will be contrary to law. In addition, it seems that your Ministry may have acted contrary to law in its approval of paragraph 4.05 of Instrument 90 which anticipates a management and working plan under which the licensee is permitted to harvest annually timber that is below the utilization standards used to calculate the allowable annual cut.

Mr. Bullen's memo (#18 above) asked then Chief Forester Robbins whether he would approve a management and working plan which proposed, on the one hand, an allowable annual cut based on an 85% sawlog utilization standard and, on the other, a "total sustained yield capacity" as the actual rate of harvest. From my review of your Ministry's correspondence (#14 and #15, above) with Westar, your Ministry had in fact already agreed that the allowable annual cut could be based on the 85% standard and that the company could harvest substantial quantities of timber in excess of the allowable annual cut so determined. As illustrated by his handwritten response to Mr. Bullen's memo, the Chief Forester had no choice but to approve an allowable annual cut calculated on that basis. For these reasons, it appears to me that your Minitry, through its agreement with Westar, fettered the Chief Forester's statutory authority to establish the allowable annual cut for the Licence area, and in so doing acted contrary to law.

IV Rent for 1985

Section 90 of the Forest Act provides that the rent to be paid by a Tree Farm Licensee for its consumption of publicly owned timber is based on the allowable annual cut.

On December 31, 1984, your Minister wrote to Westar that "I am extending the term of Working Plan No. 6, Tree Farm Licence No. 1, until December 31, 1985."

On January 14, 1985, Westar wrote a letter to your Minister to confirm

that the following operating guidelines would remain in effect until Plan #7 is approved:

> 2. 1985 rent will be calculated based on AAC as determined in MWP No. 7 which will reflect the revised utilization standards.

This letter appears to have gone unchallenged by your Ministry.

In a note dated December 6, 1984, Mr. F. Williams, a Tree Farm Licence Officer, wrote to Mr. J. Juhasz, the Director of the Timber Management Branch that

> "Mr. Doyle fortuitously 'phoned, and he is principally concerned over the prospects of basing an annual rent solely on the sawlog AAC of an area. Section 90 requires that an annual rent be paid on the productive capacity of the land!"

Preliminary Findings

I did not see in your files any response to Westar's request that its 1985 rent will be based on the sawlog component of the allowable annual cut as set out in Working Plan #7, and so I assume that this proposal was acceptable to your Minister. However, in his December 31, 1984 letter, Mr. Waterland stated that Plan #6 would be effective until the end of 1985. Hence, it appears to me that basing Westar's 1985 annual rent on the sawlog component in Plan #7 which has not yet been approved would be contrary to law.

Summary of Preliminary Findings

I have summarized my preliminary findings below:

A. The Ministry of Forests may have acted improperly in not enforcing Westar's reforestation obligations under section 145 of the Forest Act and as established in Management and Working Plan #6.

B. The Ministry of Forests may have acted contrary to law in not fulfilling its statutory responsibilities under section 4 of the Ministry of Forests Act. More specifically, it appears to me that the Ministry has neither encouraged the maximum productivity of the forest resources nor managed or conserved the forest resources having regard to the immediate and long term economic and social benefits which they may confer on the Province.

C. The Ministry of Forests may be acting contrary to law if it approves the two allowable annual cut figures as proposed in Management and Working Plan #7.

D. Given its statutory responsibility under the Ministry of Forests Act to manage and conserve the forest resources of the Crown, the Ministry of Forests may be acting improperly if it approves the 85% sawlog firmwood standard proposed in Management and Working Plan #7.

E. The Ministry of Forest may have acted contrary to law in its approval of paragraph 4.05 of Instrument 90 which anticipates a management and working plan under which the licensee is permitted to harvest annually timber that is below the utilization standards used to calculate the allowable annual cut.

F. It appears to me that your Ministry, through its agreement with Westar, fettered the Chief Forester's statutory authority to establish the allowable annual cut for the Licence area, and in so doing acted contrary to law.

G. It appears to me that basing Westar's 1985 annual rent on the sawlog component in Plan #7 which has not yet been approved would be contrary to law.

If my preliminary findings are not rebutted by your Ministry, I will be forced to share Mr. Apsey's view that Westar wants to have their cake and eat it too. My findings relate to Ministry actions and I have no comment on Westar's role in this matter. However, I will be greatly concerned to conclude that your Ministry has acceded to such demands. In doing so, it appears to me that your Ministry has erred in its administration of the Ministry of Forests Act and the Forest Act as they apply to Tree Farm Licence #1.

I fully appreciate that the majority of the forests (at least of the forests remaining) within Tree Farm Licence #1 are overmature and of generally poor quality. This, however, would not justify permitting the remainder of the good quality timber to be harvested without proper compensation to the owners - the public as represented by the Crown - and without sufficient attention given to reforestation and rehabilitation.

In light of the complexity of the issues raised by the complaint, and the ramifications of the conclusions if valid, I do not intend to set out at this stage any possible recommendations which I may make. Rather, if you are in agreement with my preliminary findings, I would invite your comments on the steps which your Ministry believes should be taken to rectify this complaint. If you are not in agreement with my preliminary findings, I would request that I receive your response on or before June 15, 1985.

If you do not respond by that date, I will assume you are in agreement with my preliminary findings and proceed to reach my conclusions and make recommendations. If my staff or I can be of assistance in providing information or otherwise, please contact me. We are available for

consultations at your request. I am sending a copy of this preliminary report to Westar as this company may be adversely affected by my final decision and possible recommendations.

Yours sincerely,

Karl A. Friedmann
Ombudsman

cc: Westar Timber Ltd.

WestarTimber

Sandy M. Fulton
President

June 3, 1985.

Mr. Karl A. Friedmann
Ombudsman
8 Bastion Square
Victoria, B.C.
V8W 1H9

Dear Mr. Friedmann,

I am in receipt of your letter of May 17, 1985 and the attached preliminary report concerning the Nishga Tribal Council's complaint re: the Ministry of Forests and Tree Farm Licence No. 1.

This report appears to make a wide range of comments about Ministry of Forests' policies and procedures, but it does not identify the exact nature of the complaint made by the Nishga Tribal Council. Therefore, it is impossible for me to comment on the validity of the complaint.

Similarly, I feel it would be inappropriate for me to comment on your investigation into the general performance of the Ministry of Forests and whether or not it has fulfilled its statutory responsibilities in the context of its legislative mandate.

However, I would like to say that I find the involvement of your office in this matter to be both untimely and unconstructive.

Westar Timber management has been working with the Ministry of Forests for many months now in a joint effort to find a workable solution to the many unique problems which beset the forest products industry in the province's Northwest. As a major employer in the region, Westar and its predecessor companies have been effectively subsidizing the Northwest for many years. For example, during the period 1979-1984 our combined Skeena Pulp and Terrace Lumber Operations suffered pre-tax losses of $101,570,000 and a net cash flow of negative $111,485,000. We are no longer capable of or prepared to continue suffering these kinds of losses; our operations in the region must either stand on their own or forfeit any chance of future survival.

continued to page 2 . . .

All of our discussions with the Ministry of Forests have been geared toward finding a way to keep our Skeena Pulp Operations at Prince Rupert and our sawmills at Terrace, Kitwanga and Hazelton operational. It is our view that the Ministry of Forests has acted in a pragmatic and responsible manner with regard to decisions made concerning TFL No. 1 and the establishment of revised utilization standards. These decisions have both taken recognition of the regional nature of the B.C. forest economy and the particularly tough operating conditions in the Northwest. As such, these decisions have made a major contribution to enhancing the viability of our operations and to the stability of employment in the region. However, I hasten to add that we continue to suffer financial losses.

For your information, I would also like to point out that Westar has developed a number of investment plans and operational proposals to improve our mills in the Northwest. These plans are based upon the framework of our agreement with the Ministry of Forests. We have also been actively pursuing opportunities to help speed up the rehabilitation of the region's decadent and overmature forests. All of these development plans and activities are placed in jeopardy by the general nature of your investigation and your preliminary report.

For these reasons, I consider your involvement in this matter to be most unfortunate, as it will simply serve to increase the instability which unfortunately has been so characteristic of British Columbia's Northwest.

Sincerely,

cc: A.C. MacPherson

Province of
British Columbia

OFFICE OF THE
DEPUTY MINISTER

Ministry of
Forests

Parliament Buildings
Victoria
British Columbia
V8W 3E7

June 13, 1985

File: 870-3-1-1A

Dr. Karl A. Friedmann
Ombudsman
No. 8 Bastion Square
Victoria, B.C.
V8W 1H9

Dear Sir:

Re: Preliminary Report
Complaint from Nishga Tribal Council on TFL No. 1

This is in reply to your preliminary report of May 17, 1985 concerning a complaint from the Nishga Tribal Council that the Ministry of Forests (Ministry) is not fulfilling its statutory responsibilities with regard to its supervision of Tree Farm Licence (TFL) No. 1.

Before responding to your specific questions, I would like to comment on the broad nature of the problems that the holder of TFL No. 1 has been facing, and of my concerns about the communities that heavily depend on the continued operations of the company.

The community and employment stability of the Terrace area, and to a lesser degree Prince Rupert, are dependent to a large extent on the "health" of the forest industry. The area's main forest company, Westar Timber Ltd., (Westar) has lost an average of approximately $16.9 million (pretax) per year for the last six years, 1979-1984, in their northern operations.

The problems of Westar are directly related to the very decadent nature of their timber and to the high cost of supplying raw material to their Watson Island pulp mills which are an integral part of their operation. Raw material for their pulp mills can either be in the form of pulp logs or wood chips produced as a byproduct of lumber production. The price of byproduct chips is approximately half the cost of chips produced from whole logs.

Should strict enforcement of all the provisions in the TFL force the company to close their mills, especially the pulp mills, there would not be a local market for either pulp logs or byproduct chips. When lumber prices are depressed, it is often the market for byproduct chips which allows sawmills to stay operational. It would be unlikely that any company would be willing to take the financial risk of either buying out Westar or building a new pulp mill in this area. The closure of the company's mills would result in the substantial loss of the communities' main employment base.

In 1983, a joint Westar and Ministry study, the Davies-Strain Report, reviewed the nature of Westar's problems in their northern operations. The Davies-Strain Report recommended a number of options which formed the basis of negotiations between Westar and the Ministry. These negotiations led to the recent amendment to their licence, Instrument No. 90. The amendment is designed to ensure that the nature of the forests and of the forest industry is reflected in the licence document so that Westar may be able to remain in business.

In my view, the negotiations were in the spirit of my Ministry's mandate, to "manage, protect, and conserve the forest and range resources of the Crown having regard to the immediate and long-term economic and social benefits they may confer on the Province" (Section 4(a), Ministry of Forests Act).

The draft Management and Working Plan was incorrect when it referred to two allowable annual cuts. Instrument 90 permits the licensee to annually harvest timber which is below the utilization standards used to calculate the allowable annual cut. The timber below this utilization standard is referred to as the "specified volume".

By recognizing in the AAC determination that pulp logs are not normally economic to utilize, yet requiring the licensee to use at least 150 000 m^3 of pulp logs per year, and by providing an opportunity for the Ministry to offer Timber Sale Licences to third parties within the TFL for the utilization of pulp logs and/or for the harvesting of stands that will yield predominantly pulp quality logs, we have, I feel, struck a reasonable balance between the Ministry's desire to utilize as much of the harvested timber as possible, and the economic realities of utilizing low quality timber.

I shall now respond to the specific questions in your preliminary report.

Question #1

Prior to signing Instrument 90, which removed the northern area from Tree Farm Licence #1, did your Ministry obtain any enforceable undertakings from Westar to ensure that that deleted area would be properly reforested as required by Management and Working Plan #6? If so, what specific obligations currently exist with respect to reforestation of the areas deleted?

(a) The Forest Act, Section 62, provides that where a licence holder surrenders his agreement, he is liable to perform all obligations under the agreement which were incurred before its surrender. It was, therefore, not necessary to include in Instrument No. 90 Westar's obligations for those lands deleted by Instrument No. 90.

The District Manager has advised Westar of their reforestation obligations on the deleted portions of the TFL. Westar has indicated their acceptance of these responsibilities. Copies of the District Manager's letter of March 5, 1985 and Westar's letter of March 7, 1985 are attached.

(b) Westar is presently planting one million seedlings in the Kinskuch area which was deleted from the TFL. Survey work is planned for the deleted area which will determine the extent of Westar's obligations.

Question #2

Has the Ministry taken any action, as it is empowered to do under section 12.03 of the Licence, to perform the silviculture necessary to reduce the regeneration lag to the required five year period, and, if not, does it intend to in the future? If such action has been taken, has Westar been billed the "reasonable costs incurred" and how much were those costs?

The Ministry of Forests has not acted under Section 12.03 of the licence. Westar has agreed to undertake their obligations with regard to the lands which were recently deleted, and we will do our reasoned best to ensure that the company will also undertake their basic forestry requirements within the TFL.

Question #3

After set-off for section 88 credits, how much stumpage has Westar actually paid to the Crown for timber harvested from Tree Farm Licence #1 since Management and Working Plan #6 came into effect in 1979?

Table 1. Credit to Stumpage Payable
TFL #1

Year	Stumpage Billed $	Cash Payment $	Section 88 Credits $	Accounts Receivable $
1980	1,719,850	102,230	1,617,620	-
1981	783,555	4,650	778,905	-
1982	247,549	1,321	246,228	-
1983	385,669	-	385,669	-
1984	802,011	7,751	794,260	-
1985*	269,032	2,013	241,134	25,885
Total	4,207,666	117,965	4,063,816	25,885

* As of May 28, 1985

Note: Information for 1979 is not readily available and would require a substantial amount of research.

I would like to assure you that we have given serious consideration to the amendments and adjustments to the Ministry standards before we approved them, and that our decisions were based on our view that they were necessary for the continued operation of the company. It has also been our view that keeping the company operational is our best assurance not only to maintain community stability in the area, but also to achieve reasonable forest management in the long run.

I trust I have been able to address your concerns satisfactorily. If you need further information or clarification, please contact me or one of my officials to arrange a meeting to discuss this matter in detail.

Yours truly,

A. C. MacPherson
Deputy Minister

B.C. Forest Service
310-4722 Lakelse Avenue
Terrace, B.C.
V8G 1R6

March 5, 1985

File: 870-3-1-1

72

Westar Timber Ltd.
Hazelton Woodlands Division
#20 Powell Rd., R.R. # 1
South Hazelton, B.C.
V0J 2R0

Attention: T. Lloyd

Dear Sir,

This will serve to confirm our conversation in that Westar Timber will be responsible for basic silviculture activities in logged area of the surrendered northern portion of T.F.L. # 1. This is referenced to Section 62 of the Forest Act.

As stated this refers to basic silviculture only and the "Free to Grow" policy will require further negotiations.

We look forward to your co-operation in this regard.

Yours truly,

G. F. Dodd,
DISTRICT MANAGER

:GFD:set
:cc: [redacted]
:0072P p 26

Denis

P.05

JUN.07 '85 15:59 MIN OF FORESTS FP PUBERT REGION

Westar Timber Ltd.

Terrace Operations
P.O. Box 3000
Terrace, British Columbia
Canada V8G 4C6

Telex 047-85542

OF 870-3-1-1 (3)
#1 73

File

TFL 1 'A'

TFL #1 CK.
'A'
Brian Bird

~~Gary Hoyd~~
CK.

March 7th, 1985

Mr. Gerry Dodd,
District Manager,
B.C. Forest Service,
#310 - 4722 Lakelse Avenue,
Terrace, B.C.
V8G 1R6

Dear Gerry:

Sorry for the misunderstanding on the Kinskuch.

We have one million seedlings coming and will be planting them in the Kinskuch this year.

We will be sending letters to the planting contractors involved reversing our March 1st letter.

Hope this clarifies the situation.

Yours truly,

WESTAR TIMBER LTD.,
Terrace Operations

J.D. Cross,
General Manager

JDC/bjg

c.c. Ken Ingram, Smithers, B.C.

Denis

JAN.25.'85 16:00 MIN OF FORESTS PR RUPERT REGION

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone (604) 387-5855
Zenith 2221

File No: 8500531

June 17, 1985

Mr. Al MacPherson
Deputy Minister
Ministry of Forests
Parliament Buildings
Victoria, B.C.
V8V 1X4

Dear Mr. MacPherson:

I am in receipt of your June 13, 1985 response to my preliminary report on your Ministry's supervision of Tree Farm Licence No. 1.

While you did answer my specific questions, it appears to me that you did not respond, even obliquely, to several of my preliminary findings. If you have any information concerning my preliminary findings which you would like me to consider before I make my final report, please provide me with the information before June 21, 1985. I would also appreciate the relevant figures for 1979 in response to question #3 by the same date.

Thank you for your attention to this matter.

Yours sincerely,

Rick Cooper
for Karl A. Friedmann
Ombudsman

Province of
British Columbia

OFFICE OF THE
DEPUTY MINISTER

Ministry of
Forests

Parliament Buildings
Victoria
British Columbia
V8W 3E7

June 20, 1985

File: 870-3-1-1A

Dr. Karl A. Friedmann
Ombudsman
No. 8 Bastion Square
Victoria, B.C.
V8W 1H9

Dear Sir:

I refer to your letter of June 17, 1985 in which you stated that you did not feel that I had responded to your preliminary findings.

The penultimate paragraph of my letter of June 13, 1985 did address your findings and was and is the basis for Ministry of Forests' actions on T.F.L. #1. Given the economic and social choices that were available to this Ministry, we do not feel that it would have been reasonable, albeit it would have been more "lawful" to invoke the full force of all the terms and conditions of T.F.L. #1. Doing so would have created a set of circumstances under which the company would have been forced to cease operations.

The response to your question #3 for 1979 will, as indicated in our earlier footnote to you, require substantial research. The information, as accurately as can be obtained at short notice, will be available late in the week of June 24, 1985.

Yours truly,

A. C. MacPherson
Deputy Minister

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

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File No: 85 00531

Your File: 870-3-1-1A

June 27, 1985

Mr. A. C. Macpherson
Deputy Minister
Ministry of Forests
1450 Government Street
Victoria, B.C.
V8V 1X4

Dear Mr. Macpherson:

Re: Nishga Tribal Council and Tree Farm Licence #1

I have received, with thanks, your letters of June 13 and June 20, 1985 in response to the findings contained in my preliminary report of May 17, 1985, and am now writing to provide you with my final report and recommendations.

As you know, I also provided Mr. S. Fulton, President of Westar Timber Ltd., with a copy of my preliminary report and extended to him an opportunity to comment before I reached a decision on this complaint. Regretably, Mr. Fulton declined to comment on the substance of my preliminary findings and instead attacked my investigation as being both untimely and unproductive. While it may be that a good offence is the best defence, I am disappointed that Mr. Fulton did not choose to point out where my preliminary findings were in error, if indeed, he is of that opinion.

It would appear that your Ministry does not accept my preliminary findings, although you concede that you might have acted more "lawfully". Your primary response to my preliminary report, as I understand it, is that your decisions were necessary in order to ensure the continued economic viability of Westar Timber's operations in Tree Farm Licence #1. You state that if strict enforcement of all the provisions of the Tree Farm Licence forces Westar to close its mills it is unlikely that any company would be willing to take the financial risk of either buying out Westar or building a new pulpmill in this area. You argue that the amendments and adjustment to Ministry standards and licence requirements which you have approved were necessary for the continued operation of Westar and that "keeping the company operational is our best asssurance not only to maintain community stability in the area but also to achieve reasonable forest management in the long run".

...2

The mandate of your Ministry is, as you point out, to "manage, protect and conserve the forest resources of the Crown having regard to the immediate and long-term economic and social benefits they may confer on the Province." And while I do not read this as requiring your Ministry to guarantee the profitability of any particular forestry company, I share your concern about the continued employment and economic stability of the local communities. I question, however, a number of the assumptions implicit in your position with respect to Westar's operations in TFL #1.

First, is a tree farm licence the most effective way to manage the forest resources in the area in question? Officials of your Ministry have suggested on more than one occasion that other forms of tenure are more appropriate (see former Deputy Minister Apsey's letter to your Minister of February 22, 1984). Second, it seems to me that your position asssumes that Westar is a well-managed forest company and that no other forest concern could meet the Tree Farm Licence requirements to properly manage the forest resources and still be profitable. Third, is it certain that if Westar ceased operations, there would be no other forest companies anxious to step in and conduct operations in the area (and provide employment to members of the community)?

In saying this, however, I accept that your position may indeed be correct, although on the basis of the information before me I am not at all persuaded. Further, I agree that it is within your mandate to consider the immediate economic benefits to be derived from our forest resources. I am very concerned, however, that your Ministry does not forget that it is also required to take into account the long-term economic and social benefits that the forest may provide to future citizens of this Province. At the current rate and method of harvest, it appears that in the not too distant future the forests of TFL #1 may be stripped of all of the good wood now standing and the cost of rehabilitating what remains will be borne, at an enormous price, by the taxpayers. If Westar can only operate by almost exclusively harvesting good wood, we certainly cannot expect them to continue operations when all of that good wood is gone.

I must also comment on your statement which I have set out below:

> By recognizing in the AAC determination that pulp logs are not normally economic to utilize, yet requiring the licensee to use at least 150 000 m^3 of pulp logs per year, and by providing an opportunity for the Ministry to offer Timber Sale Licenses to third parties within the TFL for the utilization of pulp logs and/or for the harvesting of stands that will yield predominantly pulp quality logs, we have, I feel, struck a reasonable balance between the Ministry's desire to utilize as much of the harvested timber as possible, and the economic realities of utilizing low quality timber.

...3

If Westar, with its existing pulp mill, cannot operate profitably when it harvests the existing mix of good wood (of sawlog quality) and poor wood (of pulp log quality), I am at a complete loss to understand why you believe there will be any other parties anxious to take advantage of the "opportunity" to harvest pulp logs only. I think that if I were in your position, I would want to carefully review Westar's financial statements, and to consider whether there might be other companies who could achieve good forest management and also make a profit. If we do not also consider the long-term implications of today's decisions, there may be no employment whatsoever for future generations in the forest industry in this area.

I have given you two opportunities to respond to my preliminary findings of May 17, 1985. I have considered your responses and that received from Westar Timber Ltd., and am now ready to make recommendations pursuant to section 22. Your comments, however, did not provide any information which has warranted a change in my preliminary findings.

Summary of Conclusions:

A. The Ministry of Forests acted improperly in not enforcing Westar's reforestation obligations under section 145 of the Forest Act and as established in Management and Working Plan #6.

B. The Ministry of Forests acted contrary to law in not fulfilling its statutory responsibilities under section 4 of the Ministry of Forests Act. The Ministry has neither encouraged the maximum productivity of the forest resources nor managed or conserved the forest resources having regard to the immediate and long-term economic and social benefits which they may confer on the Province.

C. Given its statutory responsibility under the Ministry of Forests Act, to manage and conserve the forest resource of the Crown, the Ministry of Forests will act improperly if it approves the 85% sawlog firmwood standard now proposed in Management and Working Plan #7.

D. The Ministry of Forests will be acting contrary to law if it approves the two components of the allowable annual cut (the allowable annual cut and the specified volume) as now proposed in Management and Working Plan #7.

E. The Ministry of Forests acted contrary to law in its approval of paragraph 4.05 of Instrument 90 which anticipates a management and working plan under which the licensee is permitted to harvest annually timber that is below the utilization standard used to calculate the allowable annual cut.

F. The Ministry of Forests acted contrary to law in fettering the Chief Forester's statutory authority to establish the allowable annual cut for the licence area.

. . . 4

G. The Ministry of Forests will be acting contrary to law if it bases Westar's annual rent for 1985 on only the sawlog component of the allowable annual cut now proposed in the latest draft of Management and Working Plan #7.

Recommendations

I recommend that the Ministry adopt one of two alternative recommendations to deal with this situation.

1. That the Ministry, pursuant to sections 59 and 60 of the Forest Act, suspend and, if the action required under the suspension order is not taken, cancel Westar's rights under Tree Farm Licence #1. I also recommended, if necessary in the short term, that action be taken to rectify the administrative errors I have outlined above in conclusions labelled A, E and F and that the proposed actions which I have criticized in conclusions labelled C, D and G not be taken.

Alternatively, if the Ministry does not consider either appropriate or advisable to implement my first recommendation, I recommend

2. That the Ministry seek approval from Cabinet for the establishment of an independent body, such as a Royal Commission of Inquiry or a Select Committee of the Legislature, to conduct a comprehensive review of the Ministry's management of Tree Farm Licence #1 and of the proposed changes in Management and Working Plan #7.

It may be that such a forum would be the most appropriate way to allow for full and open discussion of all the relevant issues.

I look forward to receiving your response to these recommendations. I would request, pursuant to section 23 of the Ombudsman Act, that if you decide not to implement my recommendations, that your inform me of your reasons for that decision by July 31, 1985.

I should add that I was most concerned to discover, via the media, that a copy of Mr. Fulton's response to my preliminary report had been released to the press. Understandably, coverage of my investigation of this complaint in the media presented only one side of the issues. In light of this and my understanding that the letter was released by a Member of the Legislative Assembly, I am considering making the remainder of our correspondence public pursuant to section 30 (2) of the Ombudsman Act.

Yours sincerely,

Signed By:
KARL A. FRIEDMANN
Ombudsman

Karl A. Friedmann
Ombudsman

cc. Mr. S. Fulton,
Westar Timber Ltd.